

(2015) 07 CAL CK 0106
In the Calcutta High Court
Case No : C.O. 2999 of 2013

Manju Gupta and Others

APPELLANT

Vs

Andhra Bank and Others

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 9
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 340
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22(g)

Citation : (2016) 1 BC 86 : (2015) 3 CALLT 505

Hon'ble Judges : Sudip Ahluwalia, J

Bench : Single Bench

Advocate : A.K. Lal Gupta, for the Appellant; S. Singh and M. Roy, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sudip Ahluwalia, J—This Revisional application has been filed against the judgement and order passed by the Chairman, Debts Recovery Appellate Tribunal, in Appeal No. 16 of 2007 arising out of the judgment and order passed by the Debts Recovery Tribunal-2 in Misc. Application No. 16 of 2001 of that Tribunal.

2. The background of the matter is that an ex parte judgement was passed against the Petitioners as well as the opposing respondent No. 3 in the Transferred application No. 251 of 1996, which had been originally filed by the Bank/Respondent No. 1 as Title Suit 85 of 1989 of the Court of the Ld. Asst. District Judge at Asansol, District Burdwan, and was subsequently transferred to the DRT.

3. The petitioners thereafter filed the aforesaid Misc. application in the DRT on the 13th of July 2000. They had sought to explain the delay in filing the application by contending that after the Ex parte judgment was passed on 13th

March 2000, they came to know about the same only on 31st March and applied for Certified copy of the same. In the meantime the Respondent/Bank had filed an application for modification of the judgment without serving any notice of the same. Such application was allowed and the Certificate originally prepared in pursuance of the judgment on 12th April was modified on 16th May 2000. After learning about the modification for on 19th May, the petitioners applied for a certified copy of the same. The copies of the amended judgment and certificate were ultimately ready on 13th June and were thereafter delivered to the petitioners. They accordingly filed the miscellaneous application in the Tribunal on 13th July 2000.

4. However the Tribunal was not convinced by the contentions raised by the applicants and ultimately dismissed the same on 4th of August 2003. The dismissal was challenged by way of the Appeal No. 16 of 2007, which was also dismissed by the DRAT on 26th of June 2013 after which the petitioners have approached this Court to assail the judgements of dismissal.

5. The application has been opposed not only by the Respondent No. 1/Andhra Bank, but also by the Respondent No. 3 who incidentally was a co-defendant (No. 4) in the original suit. The said respondent filed his Affidavit-in-opposition on 27th of January, to which the petitioners filed their Affidavit-in-reply a week later. The strongest objection against the Revisional Application has come from the respondent No. 3 who has gone to the extent of alleging some measure of collusion between the Petitioners and the Bank authorities.

6. Before proceeding to consider the objections raised by the OP No. 3 it would be worthwhile taking note of the fact that he himself had filed a separate application under Order IX Rule 13 of the Code of Civil Procedure before the Debts Recovery Tribunal against the self-same original ex parte judgement passed against all the original defendants including the petitioners on 13th March 2000. It transpires that the said application has ultimately been allowed and the ex parte judgement and decree passed by the Tribunal on 13th March 2000 set aside as against the said OP who was the original defendant No. 4 in the suit. Consequently the original suit/transferred application is now reported to be pending between the Respondent Bank and the Respondent No. 3.

7. The contention of the respondent bank before this Court has been that once the ex parte judgement and decree which was passed against all the defendants has been already set aside at the instance of one of those defendants, so the same cannot become divisible for the purpose of its enforcement as against the others, since the liability of all the defendants was determined "jointly and severally liable" to pay up the amount decreed in favour of the bank.

8. The respondent No. 3 has however opposed the prayer of the petitioners on two grounds - Firstly that the petitioners have not approached this Court with clean hands, and Secondly that this Court in its supervisory jurisdiction under article 227 of the Constitution cannot interfere with the factual findings of the

DRT as also the DRAT to the effect that the petitioners had failed to establish the grounds on which they had sought for getting the ex parte decree set aside.

9. The opposite party has alleged that his signature on the written statement allegedly filed on behalf of the defendants in the suit was itself forged and behind/beyond his knowledge; that no loan as alleged by the bank was actually granted to the original defendant number one namely M/s. Gupta Biscuit Company inasmuch as the alleged loan agreement was not entered into by any authorised person on behalf of the company, and that the conduct of the plaintiff bank and the other defendants/petitioners inter se is collusive. He has placed on record a copy of the letter dated 19.11.2004/22.11.2004 (Annexure R/1 to his affidavit in opposition) addressed to him by the Deputy Commissioner of Police, Detective Department, Kolkata Police issued in reply to his own complaint dated 19.08.04, which complaint itself is however not on record. In the said letter the Deputy Commissioner of Police has merely informed the opposite party that the alleged forgery was done in the course of judicial proceedings, and so he is advised to take up the matter with the knowledge of the Court.

10. Whether or not any of the parties were actually involved in any kind of fraud, forgery or for that matter even collusion as alleged by the opposite party is a pure question of fact which needs to be deliberated upon only by the forum in which such fraud or collusion was allegedly committed, and he has been rightly advised by the police to take recourse to appropriate remedies with the knowledge of the Court concerned. This Court is not required to make any observation on the factual aspect of such allegations. In case the alleged offences are brought to the notice of the DRT for taking appropriate action, it is for the Tribunal to satisfy itself whether or not there is any need to proceed against the alleged offenders in accordance with law such as by way of proceedings under section 340 of the Code of Criminal Procedure, and even for that purpose the proceedings and trial of the original Suit/Claim Application cannot be delayed or held hostage.

11. In *Surya Dev Rai Vs. Ram Chander Rai and Others*, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 , cited by the opposite party the Supreme Court has summarised its conclusions regarding the exercise of supervisory jurisdiction of High Courts Under Article 227 of the Constitution, and learned counsel for the opposite party has drawn attention to the extracts of Para 137 of the aforesaid judgment which are set down as under:-

"(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to

exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

12. However in the penultimate Para 38 of the self-same judgment the Apex Court has put its final word on the High Court's supervisory jurisdiction in relation to Article 227 of the Constitution as under-

"38. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where a stitch in time would save nine. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge."

13. In the present case undisputedly both the DRT and the DRAT did not find any merit in the grounds on which the petitioners had sought to have the ex parte judgement and decree set aside on account of their alleged inability to appear before the Tribunal on the relevant date. However there remains a serious and palpable omission regarding an important aspect of the matter at a different level. It needs to be remembered that the petitioners' application to set aside the ex parte judgement and decree was rejected by the Tribunal as far back as on 4th August 2003. But, as already noted earlier, the contesting opposite party separately filed his application to set aside the self-same ex parte judgement and decree against himself, much later in the year 2005. His application being Miscellaneous application No. 38 of 2005 was ultimately allowed on 15th of December 2008, and a copy of the relevant order of the DRT is on record as Annexure P - 5 from which it transpires that the ex parte judgement and order dated 13 March 2000 was set aside against him alone.

14. In *Bank of India Vs. Mehta Brothers and Others*, (2008) 4 BC 485 : (2008) 10 JT 471 : (2008) 12 SCALE 680 : (2008) 13 SCC 466 cited by the Petitioners,

the Supreme Court has observed:-

"23. We have carefully examined the provisions under Order 9 Rule 13 of the Code as well as its proviso and other relevant provisions under Order 9 of the Code. A reading of Order 9 Rule 13 of the Code would clearly show that under this provision it was clarified that an ex parte decree was ordinarily to be set aside only against the defendant against whom the decree was passed ex parte and the suit was to be revived only qua the said defendant applying for setting aside the ex parte decree. It is true that the heading of Order 9 Rule 13 of the code starts with the expression "setting aside an ex parte decree". But if we examine this provision under Order 9 Rule 13 of the Code as well as its proviso in depth and in detail, it would not be difficult for us to come to a conclusion that under Order 9 Rule 13, it has been clarified that an come to conclusion that under Order 9 Rule 13, it has been clarified that an ex parte decree is ordinarily to be set aside only as against the defendants against whom the decree has been passed ex parte and the suit is to be revived only qua the defendant who applied for setting aside the ex parte decree. Keeping this in mind, let us now examine whether the proviso to Order 9 Rule 13 of the Code gives ample power to the court to set aside the decree passed in favour of the contesting defendants at the time of setting aside the ex parte decree against other defendants.

24. Therefore, let us now deal with the proviso to Order 9 Rule 13 of the Code, it provides that in cases where the decree is of such a nature that the same cannot be set aside only as against the defendant applying for setting it aside, the decree could also be set aside as against any or all of the other defendants. Therefore, in our view, this proviso confers power on the court to set aside the entire decree if the court is of the view that the decree passed was of such a nature that the same could not be set aside only as against the defendant applying for setting aside the decree, the decree could also be set aside as against any or all of the other defendants. Therefore, this proviso clearly confers powers on the court to set aside the entire decree where the said decree was of such a nature that it is expedient in the interest of justice to set aside the decree as against any or all of the other defendants also.

29. Therefore, keeping this in mind, let us now consider whether a contested decree by some of the defendants can be set aside while considering the application for setting aside the ex parte decree against one of the defendants. This would, in our view, certainly depend on the nature of reliefs claimed by the plaintiff in his plaint and the nature of the decree in question. If the decree is indivisible, the court would be at liberty to set aside the decree not only against the defendant who applied for setting aside the ex parte decree passed against him, but also as against all or any of the other defendants.

36. As has been noted herein earlier, the ex parte decree passed by the learned Single Judge was set aside in toto on an application made by Respondent 6, that is to say, the suit has also revived against Respondents 1 to 5 who contested the suit and got the suit dismissed in the above manner. According to the learned

Single Judge, the decree passed in the suit was a single indivisible decree and the ex parte decree was accordingly set aside not only against Respondent 6 but also against Respondents 1 to 5 as well. It is against this decision of the learned Single Judge, as noted herein earlier, that an appeal was preferred to the Division Bench of the High Court, which, however, upheld the finding of the learned Single Judge on the setting aside of ex parte decree passed against Respondent 6. But at the same time the appellate court differed with the view of the learned Single Judge holding that the decree passed was indivisible and held that the learned Single Judge was not justified in setting aside the decree against Respondents 1 to 5 who contested the suit and got the suit dismissed. According to the Division Bench of the High Court, the said decree was actually two distinct decrees i.e. one against Respondent 6 and one in favour of Respondents 1 to 5, and on that finding the Division Bench has set aside the finding of the learned Single Judge on the question whether the decree was divisible or not and accordingly, has set aside the order of the learned Single Judge to that extent and against which the present appeal has now been preferred by the appellant Bank.

37. In our view, the Division Bench was not justified in setting aside the above part of the order of the learned Single Judge on the ground that the decrees were two distinct decrees: one against Respondent 6 and one in favour of Respondents 1 to 5. It is to be noted that the judgment of the learned Single Judge as well as of the Division Bench had not proceeded on the basis that the decree was entirely ex parte against all the defendants. Therefore, we have to see the nature of the decree for the purpose of coming to a proper conclusion whether the decree could be indivisible or the decree that was passed were two separate distinct decrees. In this connection, it would be important to refer to a minority decision of the Assam High Court in *Khagesh Chandra v. Chandra Kanta Barua*, which would be relevant for us to illustrate and answer this question. Accordingly, we quote the observations made by the Assam High Court with which we are in full agreement which are as follows: (AIR p. 193, para 52):-

"52....What is to be considered is not whether the plaintiff is estopped from claiming further relief against the defendant without going to the appellate court, since there has been an adjudication between him and the defendant who appeared at the earlier hearing, but whether the defendant who was absent at the time (for sufficient reasons) should not get a chance to reopen the entire suit in his interest, if the justice of the case so demands. To my mind, the intention of the legislature is to give him such relief and therefore the proviso to Order 9 Rule 13, Civil Procedure Code, admits of no narrower interpretation, and when the decree is of such a nature that proper relief cannot be given to the applying defendant without setting aside the decree against other defendants (no matter in what shape it existed), the decree may be set aside as against the other defendants also."

42. As noted herein earlier, we have already discussed that in the judgment, it was held that Respondent 6 against whom the ex parte decree was passed, was

only liable to pay the decretal amount to the appellant Bank. The suit was dismissed as against Respondents 1 to 5 only on the ground that the claim of the appellant Bank was satisfied against Respondent 6 and in view of such relief already obtained by the appellant Bank against Respondent 6, Issues 2, 7 and 8 were held in favour of Respondents 1 to 5 and as a result of that, the suit was dismissed on contest as against Respondents 1 to 5, Accordingly, we are of the firm opinion that the ex parte decree was indivisible and rightly set aside not only against Respondent 6 but also against Respondents 1 to 5...."

45. Accordingly, we set aside the judgment of the Division Bench of the Delhi High Court so far as it had set aside the order of the learned Single Judge restoring the suit in its entirety and therefore, the judgment of the learned Single Judge is restored to its original file.

(Emphasis Added).

15. In the present case also, as has been noted earlier, the ex parte decree passed against the original defendants made them "jointly and severally," liable to satisfy the claim of the plaintiff bank. This would become clear on perusal of the ordering portion of the aforesaid Judgment which is set out as under:-

".....Hence, it is,

Ordered

That the T.S. No. 85 of 1989, re-numbered as TA/251/96 be and the same is allowed ex parte with costs as against the Defendants No. 1 to 5 and no order is passed as against the Defendant No. 6 as no relief has been prayed for.

The applicant bank is entitled to realise a sum of (Rs. 18,97,695.42 - Rs. 59,640.35) Rs. 18,38,055.07 from the Defendants No. 1 to 5 jointly and severally.

The applicant bank is also entitled to realise interest @ 16% p.a. over the above sum during the period from 31.7.89, the date of filing of the suit to the date of actual realisation, from the defendants No. 1 to 5 jointly and severally, who are directed to make the payment within two months from the date of this order, failing which the Recovery officer shall proceed to realise the amount in accordance with law....."

(Emphasis Added)

16. As such there remains no doubt that the ex parte decree in question was indivisible qua the defendant Nos. 1 to 5 who had all been found to be "jointly and severally," liable. In that view of the matter, the aforesaid ex parte decree should not have been set aside only against one set of the defendants alone, since a plain reading of the ordering portion did not mention about any distinct or separate individual liabilities of the defendants. Consequently if it was set aside against any one of the defendants, the other against whom such decree had been passed also stand to be exempted from its effects since their liability as

determined was in no way separate from that of the defendant No. 4 i.e. the Opposite Party No. 3 in this revisional application. The allegations that the present petitioners had not been diligent in contesting the claim earlier, or that they had not approached the Tribunal for setting aside the ex parte judgment and decree with clean hands, even if found to be true, in the given circumstances would become only incidental, since their liability as determined in the impugned judgment was indistinguishable from that of the particular defendant in whose case the said decree was set aside.

17. It also becomes clear that the fact that the impugned ex parte decree had already been set aside against the defendant No. 4 during the course of Miscellaneous case No. 38 of 2005 was clearly not within the knowledge of the Learned DRAT which was all along under the impression that the concerned ex parte judgment was still operative as against the respondent Dr. Anil Kumar Gupta. This would become crystal clear on perusal of the following observations put on record by the learned DRT, which are there on the internal page 4 of the impugned judgment:-

".....Respondent No. 4 Dr. Anil Kr. Gupta filed an application under Order 9 Rule 13 of the Code of Civil Procedure, read with Section 22(g) of the DRT Act, 1993 for recalling/setting aside the ex-parte judgment dated 13th March, 2000. It was on the ground of non-service of notice/summons in T.A. No. 251 of 1996. An application for condonation of delay, if any, in filing the recalling application was also filed. By order dated 1st November, 2006 the Ld. DRT-2 allowed the application for condonation of delay and the application for setting aside of the ex-parte judgment continued to remain...."

(Emphasis Added)

18. In these circumstances, the remains little doubt that had the DRAT not been under the misconception that the ex-parte judgment as against the defendant number 4 had not been set aside, it would have taken an entirely different view of the matter being cognizant of the fact that such judgement was indivisible in relation to the defendants, and therefore also ought to have been set aside against the remaining defendants in the light of the decision of the Apex Court in "Bank of India v. Mehta Brothers and others" (supra).

19. On account of such peculiar circumstances transpiring before this Court, the decision of the learned DRAT would appear to be liable to be modified in order to enable the petitioners to contest the claim at par with the defendant No. 4 since their liability had been determined as being indivisible from the aforesaid individual defendant/OP No. 3.

20. For the aforesaid reasons the Revisional application is allowed and the impugned judgement passed by the learned DRAT is set aside. Consequently the order of the DRT dated 4th of August 2003 dismissing the miscellaneous application number 16 of 2001 filed by the petitioners also stands quashed.

21. The petitioners are therefore permitted to contest the original claim application of the respondent bank in the Tribunal from the stage at which they were proceeded against ex parte earlier.

No order as to costs.