

**(2008) 11 OHC CK 0063**

**In the Orissa High Court**

**Case No :** Writ Petition (C) No's. 14189 of 2008

Shailashree Enterprises (P) Ltd.

APPELLANT

Vs

Presiding Officer, D.R.T. and Ors

RESPONDENT

**Date of Decision :** 25-11-2008

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 21

**Citation :** (2008) 11 OHC CK 0063

**Hon'ble Judges :** Dr. B.S. Chauhan, C.J;B.N. Mahapatra, J

**Bench :** Division Bench

**Advocate :** S.P. Misra, Partha Mukherji, A.C. Panda, B. Panigahi, Suvalaxmi and S. Mukherji, for the Appellant; N. Patra, A.K. Patra and B.N. Shadangi for Opp. Part No. 2, for the Respondent

**Final Decision :** Dismissed

## Judgement

DR. B.S. Chauhan, C.J.—This case has a chequered history. The Petitioner had taken loan of huge amount and claims that he has a right not to repay the same. It is not bound by any terms and conditions incorporated in the bi-lateral agreement and in order to avoid payment of outstanding dues, it is filing petition after petition, however, has not deposited a single paise even after determination of the dispute by the Debts Recovery Tribunal (hereinafter called the "Tribunal"). Though the outstanding decretal amount had been above five crores as on 19.12.2006 and if it is recovered now, it will be over and above six crores.

2. The facts and circumstances giving rise to the case are that Opposite Party No. 2 on 7.10.2003 had sanctioned C.C. of Rs. 2 crores against hypothecation of stocks and raw materials, letter of credit of Rs. 2.35 crores and letter of Guarantee of Rs. 15 lakhs. As per the terms of contract Petitioner had to repay the loan with interest " Rs. 14.75%. Subsequently the loan was enhanced to Rs. 4.5 crores. The amount was not paid. There was some dispute between the office bearers of the Company and some of the private Opposite Parties. The creditor

approached the Tribunal for recovery of Rs. 5,05,77,220/- (Rupees five crores five lakhs seventy seven thousand two hundred twenty only). In spite of service of notice except one Purusottam Patel ( Respondent No. 2 before the Tribunal not party in the petition), none turned up to contest the case. Thus, the Tribunal vide its ex parte judgment and Order Dated 19.12.2006 directed the Petitioner? Company, its Director and Guarantors to make payment of the aforesaid amount of Rs. 5,05,77,220/- with interest " 12% per annum from 19.12.2006 till realisation. Petitioner filed an application under Order 9, Rule 13 CPC on 17.1.2007 for setting aside the ex parte judgment and decree on the ground that the order had been passed without observing the principles of natural justice. Grounds were taken that the applicant was out Orissa and therefore, he could not know the pendency of the said proceedings.

3. While dismissing the said application, vide Order Dated 5.4.2007 the Tribunal held as follows:

The Defendant Nos. 1 is M/s. Sailashree Enterprises Pvt. Ltd. and its registered office is situated at B/33, Industrial Estate, Cuttack-753010. The Defendants No. 2 to 4 are the Directors. Defendant No. 5 is the wife of Defendant No. 2. Defendants No. 6(a) and 6(b) are the legal heirs of the deceased Defendant No. 6. Defendant No. 7 is a resident of Balasore. Defendants No. 8 to 10 are residents of Cuttack as per the addresses given in the cause title and the same was not disputed. If really, the Defendants No. 2 to 10 have gone to Gujarat to attend family functions from 10.10.06 and stayed there till end of October. They should have mentioned for what family function they have visited Gujarat. Therefore, it is highly improbable to believe that the Defendant Nos. 2 to 10 had been to Gujarat and stayed there for nearly 20 days without attending to their work at their place of residence. Therefore, it is very clear that the Defendant's Nos. 1 to 10 deliberately remained ex parte and now they have come forward with this petition after issuing certificate just to prolong the matter. Therefore, considering the said facts and circumstances, I am of the view that there are no grounds to allow this petition.

4. Being aggrieved, Petitioner challenged before this Court the orders dated 19.12.2006 and 5.4.2007 by filing Writ Petition Nos. 5927 of 2007 without filing the appeal before the Debt Recovery Appellate Tribunal ( hereinafter called "DRAT"). This Court vide its judgment and Order Dated 19.12.2006 disposed of the said Writ Petition taking a lenient view without asking the Petitioner to approach the appellate forum, though was so required under the law, setting aside the ex parte judgment and order of the Tribunal and directing the Petitioner to deposit a sum of Rs. 30 lakhs within a period of two weeks and to file written statement. The relevant part of the Order Dated 19.12.2006 reads as under:?

We make it clear that since the claim against the Petitioners is to the tune of Rs. 5,05,77,220.00, this Court directs that the Petitioners shall give a bank draft in the name of the applicant-bank to the tune of Rs. 30,00,000/- (Rupees Thirty Lakhs) within two weeks from today. In case there is any default in filing the

affidavit by the Defendant-Petitioners, the same will not be accepted by the Tribunal. The deposit be made by the Petitioners without prejudice to the rights and contention of the parties.

5. Petitioner did not deposit any amount within the time stipulated by this Court i.e. two weeks from the date of the order, the Tribunal refused to accept the written statement. Writ Petition Nos. 12932 of 2007 was filed by the Petitioner before this Court on the ground that deposit of Rs. 30,00,000/- (Rupees Thirty Lakhs ) was not a pre-condition for acceptance of the written statement. Various other technical grounds were also raised. However, this Court vide judgment and Order Dated 6.8.2007 dismissed the Writ Petition with liberty to the Petitioner to approach the appellate forum. In pursuance of the said order, the Petitioner approached the appellate forum by filing appeal against the judgment and order of the Tribunal with an application to waive the pre-deposit condition u/s 21 of the RDDB Act, 1993. The Tribunal rejected the said application vide Order Dated 30.9.2008 observing that Petitioner had not deposited any amount whatsoever either in pursuance of the earlier order of the High Court or ensured compliance of the requirement of pre-deposit condition as prescribed under the Statute. Therefore, it had no intention to make any deposit whatsoever. Hence this Writ Petition.

6. Admittedly, the Petitioner incurred huge liability. It has approached this Court three times and has no intention to deposit any amount whatsoever. This Court while hearing the case on 1.10.2008, taking sympathetic view and considering the judgment of the Hon"ble Supreme Court in V.K. Industries and Others Vs. Madhya Pradesh Electricity Board, Rampur, Jabalpur, ; asked the Learned Counsel for the Petitioner Mr. Partha Mukherji to find out as to whether the Petitioner was willing to deposit some part of the decretal amount to meet the condition which could be imposed while considering the application under Order 9, Rule 13 Code of Civil Procedure. The matter was listed on 17.10.2008 and Mr. Mukherji did not show any willingness to advance any argument whatsoever. The order sheet reads as under: ?

List this matter after four weeks, as Learned Counsel for Petitioner does not want to argue the case. However, mere pendency of the Writ Petition will not prevent the Opposite Parties from making recovery of the loan in accordance with law.

Again this matter was listed on 20.11.2008 and adjournment was sought for today, but there is no inclination on the part of the Petitioner to make any deposit to show his bona fide. In such a fact situation, whatever may be the law, the Petitioner disentitled itself from equitable relief from writ Court.

7. Writ jurisdiction is a discretionary. Writ is not issued merely because it is lawful to do so. Once a factual stand is taken, it cannot be changed on any legal proposition whatsoever nor it is permissible for the Court to examine the correctness of the findings of fact unless it is found to be perverse being based on no evidence or contrary to evidence, as the writ Court exercises its

supervisory jurisdiction and not of appellate forum. The purpose of the writ Court is not only to protect a person from being subjected for violation of law but also to advance justice and not to thwart it. Writ is a equitable relief. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being the power discretionary, the Court has to balance competing interest, keeping in mind that interest of justice and public interest can coalesce in certain circumstances. More so, justice is required to be done to both the parties as warranted by the facts involved in the particular case. (Vide Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, ; Ramniklal N. Bhutta and another Vs. State of Maharashtra and others, ; Municipal Committee Tauru Vs. Harpal Singh and Another, ; Chimajirao Kanhojirao Shirke and Another Vs. Oriental Fire and General Insurance Co. Ltd., ; Shama Prashant Raje Vs. Ganpatrao and Others, ; Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another, ; Roshan Deen Vs. Preeti Lal, ; S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. and Others, ; and Chandra Singh Vs. State of Rajasthan and Another, .

8. Today, we have heard Mr. S.P. Mishra, Learned Senior Counsel for the Petitioner who raised all factual, legal and technical grounds but has not shown any inclination that his client was willing to make any part payment of the decretal amount in order to show its bonafides.

9. In such a fact situation, we are of the considered view that petition does not present any feature warranting interference by the writ Court in equity jurisdiction. No fault is found with the judgment and order of DRAT, impugned herein.

10. In the instant case, the Petitioner and the private Opposite Parties are determined not to deposit any amount whatsoever. In such a fact situation it become undesirable to entertain the petition. It is accordingly dismissed.

B.N. Mahapatra, J.

11. I agree.