

(2010) 02 MP CK 0002
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2422 of 2009

Suresh Sharma

APPELLANT

Vs

Punjab and Sindh Bank and Others

RESPONDENT

Date of Decision : 19-02-2010

Acts Referred:

Administrative Tribunals Act, 1985 — Section 22(3)
Arbitration and Conciliation Act, 1996 — Section 11(5)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 114
Constitution of India, 1950 — Article 227
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 5A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22,
22(2), 22(3), 26(2)

Citation : AIR 2010 MP 173 : (2010) ILR (MP) 1371 : (2010) 3 MPJR 18

Hon'ble Judges : R.S. Jha, J;A.K. Shrivastava, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This petition under Article 227 of the Constitution of India has been filed on behalf of the Petitioner seeking following reliefs:

In the facts and circumstances of the case, this Hon. Court may be pleased to issue a writ in the nature of

(i) Certiorari quashing the order, dated 27-1-2009, (Annexure P/16) passed by Debt Recovery Appellate Tribunal in Appeal Sr. No. 54 of 2007;

Any other order or orders that this Hon. Court deems fit and proper in the facts and circumstances of the case may also kindly be passed.

The unfolded facts are as under:

(A) 1-5-2008/AnnexureP/I. Respondent/ Bank filed a suit for recovery of Rs. 64,09,718/- against Respondent No. 2 company and in that suit, present

Petitioner was arrayed as Defendant No. 4. The suit was transferred to the Debts Recovery Tribunal (hereinafter, referred to as "DRT"), on account of its establishment.

(B) 12-7-2004/Annexure P/2. Petitioner filed an application for setting aside ex parte judgment u/s 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter, referred to as the Act of 1993) on the ground of non-service of notice after transfer of the case to DRT.

(C) October, 2004/Annexure P/3. Petitioner submitted an application for correction of the certificate u/s 26(2) of the Act of 1993 on the ground that the Petitioner had not executed any personal guarantee, and therefore, could not have been held personally liable to pay the amount due to the Bank.

(D) 13-11-2004/Annexure P/4. The Bank filed reply and refuted the averments.

(E) 4-2-2005/Annexure P/5. Application for setting aside ex parte judgment dismissed as no sufficient ground was made out to condone the delay.

Application for correction u/s 26(2) rejected as prayer made is found to be beyond the scope of Section 26(2) of the Act of 1993. The DRT further observed that as no appeal or review of the judgment has been filed, no relief can be granted.

(F) R. A. No. 2 of 2005. February, 05/ Annexure P/6. Petitioner filed review of the judgment of DRT on the ground that since admittedly no personal guarantee is given by the Petitioner, he could not be held jointly and severally (personally) responsible to pay the dues of the Bank.

(G) 9-7-1999/Annexure P/7. Affidavit of Shashi Paul Lakhwara filed as the sole affidavit in the transfer application. In para 5, it has been stated that personal guarantee has been executed by Defendants No. 2, 3 and 5.

(H) May, 2005/Annexure P/8. Against the application for review, reply was filed by the Bank (Respondent No. 1) along with two documents, they are:

(i) Agreement, dated 10-4-1995 (D/1-A) and

(ii) Memorandum of understanding (D/1-B).

These documents were not filed in the original suit in which ex parte decree was passed against the Petitioner.

(I) 4-8-2005/Annexure P/9. Review petition was allowed by the DRT and the Petitioner was absolved from personal liability. Above documents D/1-A and D/1-B held since they were not filed in Transfer application, cannot be relied upon by the Bank in review application (Paras 10 to 13 and 17).

(J) Appeal No. 593/05.

13-10-2005/Annexure P/10. Appeal filed by the Bank before the Debts Recovery

Appellate Tribunal against the order allowing review application by the DRT.

(K) 26-2-2007/Annexure P/12. Appeal was dismissed bi-parte by the Debts Recovery Appellate Tribunal, further holding that the DRT justified in reviewing the judgment.

(L) Appeal SR 54/07 (Review by the Bank) 5-4-2007/Annexure P/12. The Bank filed review before the Debts Recovery Appellate Tribunal which was barred by time seeking relief upon the following documents which were not even the part of Transfer Application (Original Suit) and they were not even filed before the Debts Recovery Appellate Tribunal also in the earlier appeal No. 593/05; they are:

- i. Resolution dated 31-5-1995 authorising the Petitioner to operate the account.
- ii. Order dated 14-11-1995 passed in Writ Petition No. 939/95 (referred in the return of the Respondent No. 1.)
- iii. Letter dated NIL by the Petitioner to MPSIDC.
- iv. Arbitration Award dated 19-6-2006 (referred in the return of Respondent No. 1.).

(M) Annexure P/14. Order sheets of Debts Recovery Appellate Tribunal, notice issued only on the application to condone the delay (order sheets dated 14-5-2007, 28-8-2007 and 9-10-2007).

(N) Order Sheet dated 28-8-2007/Annex-ure P/14. This order sheet of the Debts Recovery Appellate Tribunal mentions that the application to condone the delay in filing the review application is not on record and counsel wants time to go through the record. Order sheet dated 9-10-2007 of Debts Recovery Appellate Tribunal. Counsel indicates that the applicant (Respondent No. 1 herein this petition) stated that the applicant/Bank has moved an application to condone the delay.

(O) 12-2-2009/Annexure P/15. Letter of Advocate. Arguments were heard only on the question of limitation.

(P) 27-1-2009/Annexure P/16. Impugned order of the Debts Recovery Appellate Tribunal allowing the review application and remanding the case to DRT for fresh decision subject to conditions.

The contention of Shri Ravish Agrawal, learned Senior Counsel appearing for the Petitioner is that although the DRT rejected the application of the Petitioner for setting aside the ex parte judgment u/s 22(2)(g) of the Act of 1993 as well as another application for correction of certificate u/s 26(2) of the said Act, by order dated 4-2-2005 against which Review Application No. 2/05 was filed by the Petitioner on the averment that because on showing of the Bank itself present Petitioner cannot be held jointly and severally (personally) liable to pay the dues of the Bank, since as per the affidavit of Officer of the Bank namely Shashi Pal Lakhwara other Defendants No. 2, 3 and 5 executed the personal guarantee, and

because, there was a mistake apparent on the face of record, the learned DRT rightly allowed the review application on 4-8-2005 (Annexure P/9) and rightly further held that the agreement dated 10-4-1995 (D/I-A) and memorandum of understanding (D/I-B) were not the part of the original suit, therefore, the Bank is not entitled for any relief on the basis of those two documents against the Petitioner.

Further it has been contended by the learned Senior Counsel that the Bank preferred Appeal No. 593/05 against the said order of DRT before the Debts Recovery Appellate Tribunal which was also admittedly dismissed on 26-2-2007 (Annexure P/ 12) holding that the learned DRT was justified in reviewing the judgment. Further it has been contended by the learned Senior Counsel that review application was filed by the Bank before the Debts Recovery Appellate Tribunal to review its order dated 26-2-2007 and in that review application, impugned order has been passed by the Debts Recovery Appellate Tribunal basing its decision on certain documents which were not filed in the original proceedings and which were even not filed before the Debts Recovery Appellate Tribunal also while hearing Appeal No. 593/05 by the Bank, and which came in existence later on and, therefore, the impugned order which has been passed not only condoning the delay in filing the review application, but at the same time, further held that subject to conditions directing the Petitioner to deposit fifty per cent of the total amount shown in the recovery certificate, i.e. Rs. 64,09,718 minus interest pendente lite and future and costs within the period stipulated in the impugned order (para 43) failing which review application filed by the Bank shall stand accepted and the ex parte order passed by the learned DRT on 1-5-2000 shall prevail. Further it has been observed in para 44 of the impugned judgment that last opportunity to file written statement was given to the Petitioner. The contention of the learned Senior Counsel is that by passing such order, the learned Debts Recovery Appellate Tribunal travelled beyond the scope of review and reopened the original suit which was not permissible within the four corners of law. Learned Senior Counsel further submitted that this was not even the prayer made in the review application by the Bank. In support of his contention, learned Senior Counsel has placed heavy reliance on a decision of the Supreme Court in *State of West Bengal v. Kamal Sengupta* (2008) 8 SCC 612 : AIR 2008 SCW 4294 wherein the Supreme Court has given tests how the application of review is to be dealt with. On these premised submissions, it has been contended by the learned Senior Counsel that this petition be allowed and the order impugned be set aside.

Shri S. C. Sharma, learned Counsel appearing on behalf of the Respondent No. 1/ Bank has argued in support of the impugned order and inter alia raised an objection in respect of territorial jurisdiction of this Principal Bench since according to the learned Counsel, the parties reside at Indore, the loan was taken at Indore and the civil suit was also filed at Indore which was later on transferred to DRT on account of its establishment and, therefore, the Indore Bench of this Court is having territorial jurisdiction.

Shri Maindiretta, learned Counsel for the Respondents No. 6 and 7 submitted that he has nothing to say.

Having heard learned Counsel for the parties, we are of the considered view that this petition deserves to be allowed.

So far as the objection of the learned Counsel for Respondent No. 1 about the territorial jurisdiction is concerned, according to us, this Principal Bench at Jabalpur is also having the territorial jurisdiction for the simple reason that although the suit was originally filed at Indore, but on account of establishment of DRT, it was transferred to Jabalpur where ex parte order was passed and the review application of the Petitioner was also allowed. Against the order allowing the review application by DRT, an appeal before the Appellate Tribunal was filed by the Bank at Allahabad which was dismissed and later on the impugned order of review has been allowed. According to us, since part of cause of action had arisen at Jabalpur and further because directions are given by the Debts Recovery Appellate Tribunal to DRT to decide the matter which is at Jabalpur, therefore, this Principal Seat is having territorial jurisdiction. In this context, we may profitably place reliance on a decision of the Supreme Court in *Ambica Industries Vs. Commissioner of Central Excise, , Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, .* We may also place reliance on an earlier decision of the Supreme Court in *Sri Nasiruddin Vs. State Transport Appellate Tribunal*, (para 36). Hence, we hereby overrule the objection raised by the learned Counsel for Respondent No. 1 about the territorial jurisdiction by holding that the Principal Bench of this Court at Jabalpur is having the territorial jurisdiction.

Coming to the merits of the case, on bare perusal of the aforesaid admitted facts, this Court finds that Respondent No. 1/Bank who filed a civil suit for recovery of the loan amount against Respondent No. 2/Company which was transferred to DRT at Jabalpur and was decreed in ex parte on 1-5-2000 and the Defendants including the Petitioner were held jointly and severally liable to pay the amount. Petitioner filed an application for setting aside the ex parte judgment as well as for correction of certificate u/s 22(2)(g) and 26(2) of the Act of 1993, but both these applications were dismissed by the DRT on 4-2-2005. Petitioner again filed a review application on the averment that since the Petitioner did not give any guarantee in personal capacity, he cannot be held jointly and severally (personally) responsible to pay the dues of the Bank. Affidavit of officer of the Bank namely Shashi Pal Lakhwara which was filed in the Transfer Application also indicates that personal guarantee was executed by Defendants No. 2, 3 and 5. This review application was ultimately allowed by the DRT vide order dated 4-8-2005 (Annexure P/9) and the Petitioner was absolved from personal liability. Further it has been observed by the DRT about the documents, D/I-A and D/I-B, which were filed by the Bank in reply to the review application, that they were not filed in Transfer Application (original suit).

Appeal No. 593/05 filed by the Bank against the said review order of the DRT,

was also dismissed on 26-2-2007. Against this order which was passed on 26-2-2007, Bank filed review application (Appeal SR No. 54/ 07) which was barred by time and an application to condone the delay was filed which was to be heard and order was to be passed. But by the impugned order (Annexure P/14), not only the delay has been condoned, but the original ex parte order has also been re-opened by directing the Petitioner to deposit the amount as indicated in para 43 of the impugned judgment which we have also referred herein above. On going through the impugned order, we find that while allowing the review application, the learned Debts Recovery Appellate Tribunal has taken into consideration certain documents which are referred herein above in paragraph 2 of this order as (i) to (iv). These documents were neither part of Transfer Application (original suit) nor they were filed before the learned Debts Recovery Tribunal while hearing the review application. Not only this, while allowing the review application, the learned Tribunal has also taken into consideration the arbitral award passed by the sole Arbitrator dated 19-6-2006 which was passed after the review application filed by the Petitioner was allowed by the DRT.

The procedure and powers of the Tribunal constituted under the Act of 1993 have been enacted in Section 22 of the said Act. On bare perusal of Sub-section (2) of Section 22, this Court finds that powers of re-view can be exercised by the Tribunal and the Appellate Tribunal in the same manner as are vested in civil Courts under Code of Civil Procedure, 1908 while trying suits. It would also be quite relevant to go through Rule 5-A of the Debts Recovery Tribunal (Procedure) Rules, 1993 which also speaks that when there is a mistake or error apparent on face of the record, review can be made. Hence, according to us, by passing the impugned order by the learned Debts Recovery Appellate Tribunal by taking into consideration certain documents which were not even earlier filed before the DRT or before the Appellate Tribunal while hearing appeal against the review, according to us, the impugned order appears to be arbitrary and de hors to the provisions of Section 22 as well as Rule 5-A of the Act of 1993 and the rules made thereunder. The Supreme Court in the case of Kamal Sengupta (supra) while considering the powers of review conferred upon the Tribunals u/s 22(3)(f) of the Administrative Tribunals Act, 1985 has held that these powers are akin/ analogous to the power of a civil Court u/s 114 read with Order 47, Rule 1 of the Code of Civil Procedure, 1908. The power vested in the civil Courts under the Code of Civil Procedure, 1908 while trying suits has been conferred to the DRT as well as Debts Recovery Appellate Tribunal constituted under the Act of 1993 and Clause (e) of Sub-section (2) of Section 22 includes reviewing of the decisions. Hence, powers of review as vested in civil Court, as envisaged u/s 114 and Order 47, Rule 1 of the Code of Civil Procedure, 1908 are squarely applicable on the DRT, as well as Debts Recovery Appellate Tribunal. The Rules of 1993 are framed under the Act of 1993 and Rule 5-A is clear like a luminous day and by no stretch of imagination it can be said that even under the Rules, a different scope of review not akin/analogous to Section 114 and Order 41, Rule 1 of the CPC is there. We think it appropriate to quote para 35 of the above said judgment of the

Supreme Court in Kamal Sengupta (supra) which reads thus:

35. The principles which can be culled out from the above noted judgments are:

(i) The power of the Tribunal to review its order/decision u/s 22(3)(f) of the Act is akin/analogous to the power of a civil Court u/s 114 read with Order 47, Rule 1, CPC

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47, Rule 1 and not otherwise.

(iii) The expression "any other sufficient reason" appearing in Order 47, Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power u/s 23(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed u/s 22(3)(f) on the basis of subsequent decision/judgment of a co-ordinate or larger Bench of the Tribunal or of a superior Court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

Judging from all the angles, we are unable to uphold the impugned order and, therefore, the same is hereby set aside and the order dated 4-8-2005 (Annexure P/9) passed by the DRT allowing the review application of the Petitioner and the order passed in Appeal No. 593/05 dated 13-10-2005 (Annexure P/10) are hereby restored.

However, on going through the averments made in the return as well as the order, we find that an award has been passed by the sole Arbitrator of Arbitral Tribunal dated 19-6-2006 (Annexure R/5) which was appointed by the Indore Bench of this Court u/s 11(5) of the Arbitration and Reconciliation Act, 1996, vide order dated 9-9-2002 passed in M. C. C. No. 79/2001 which is between Avatarsingh Narang and Suresh Sharma (present Petitioner), as well as some order in Writ Petition No. 2858/07 of Indore Bench of this Court dated 29-6-2007 in which present Petitioner is also a party. The Petitioner shall abide the order

and award passed by the Arbitral Tribunal if it had attained finality, as well as order Annexure R/4 passed by this Court at Indore Bench in Writ Petition No. 2858/07 (Avtarsingh Narang and Ors. v. Suresh Sharma and Ors.) dated 29-6-2007 and, by this order, they shall not be deemed to be nullified, nor would it preclude the Respondents to take steps on that basis. We may further make it clear that this order has been passed only to resolve dispute arisen between the parties in the aforesaid circumstances in DRT.

Petition is allowed to the extent indicated herein above with no order as to costs.