

(2005) 06 JH CK 0002

In the Jharkhand High Court

Case No : C.W.J.C. No's. 3510 and 8842 of 2000 (P) and Company Petition No. 2 of 1996 (R)

Tata Iron and Steel Co. Ltd. and Bihar State Industrial Development Corporation Ltd.

APPELLANT

Vs

The Presiding Officer, Debts Recovery Tribunal and Others

 Kumardhubi Metal Casting and Engineering Ltd. Vs
Kumardhubi Karmchari Congress and Others

RESPONDENT

Date of Decision : 14-06-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 233
Companies Act, 1956 — Section 442, 446, 456, 537
Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 18, 19, 19(4), 19(7), 25
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20(1)

Citation : (2006) 3 BC 31 : (2005) 3 JCR 307

Hon'ble Judges : S.J. Mukhopadhaya, J

Bench : Single Bench

Advocate : A. Allam and Shravan Kumar, for CWJC Nos. 3510 and 8842 of 2000P, G.M. Mishra and Rajesh Kumar, for CWJC Nos. 3510 and 8842 of 2000P and Lakhan Sharma, M.M. Pal and I. Bhaduri, for C.P. No. 2 of 1966R, Lakhan Sharma, for CWJC Nos. 3510 and 8842 of 2000P, for the Appellant; B.P. Verma, A. Allam, S.P. Sinha, R. Kumar, S.K. Sinha, T. Kabiraj, Rajesh Kumar, Saibal Mitra and Ragini Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—In both the writ petitions as common questions of law are involved and some of the common orders are under challenge, they have been heard together and are being disposed of by this common judgment.

2. Tata Iron and Steel Co. Ltd. (hereinafter to be referred as TISCO") has preferred the first writ petition i.e. C.W.J.C. No. 3510 of 2000(P)

against the order dated 1st February; 2000, passed by the learned Presiding Officer, Debts Recovery Tribunal, Patna, in Case No. O.A. 2 of

1997, whereby the learned Presiding Officer allowed the petition, preferred by the 3rd respondent-Bank of India, Chirkunda Branch, Dhanbad

(hereinafter to be referred as the "Bank") u/s 19(4) of the Recovery or Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter to be

referred as the "Act, 1993"), ex-parte with cost and interest pendente lite and future at the rate of 12% per annum until full and final realization of

the claim amount. It was ordered to issue certificate u/s 19(7) of the Act, 1993 and to forward the same to the Recovery Officer, Debts Recovery

Tribunal, Patna, for its execution under Sections 25 and 28 of the Act, 1993. This petitioner has also challenged the order dated 7th February,

2000, passed by the said Tribunal, whereby and whereunder, the certificate under Sub-section (7) of Section 19 of the Act, 1993 has been drawn

up against the petitioner and two others and forwarded to the Recovery Officer, Debts Recovery Tribunal, Patna.

3. The other petitioner i.e. Bihar State Industrial Development Corporation Ltd. (hereinafter to be referred as "BSIDC") of 2nd writ petition i.e.

C.W.J.C. No. 8842 of 2000(P) while challenged the common order dated 1st February, 2000, passed by the learned Presiding Officer, Debts

Recovery Tribunal, Patna, in case No. O.A. 2 of 1997, has also challenged the orders dated 14th July and 29th August, 2000, both passed by the

Recovery Officer, Debts Recovery Tribunal, Patna, in Recovery Proceeding No. 17 of 2000 for recovery of the certificate amount from the

petitioner and two others and in favour of the respondent-Bank.

4. While both the petitioners have challenged the orders mainly on the grounds that; they have been passed in violation of the rules of natural

justice, in absence of necessary parties, the amount can not be recovered from the petitioners and the impugned orders are not based on any

ground. The stand taken by the respondent-Bank is that this Court should not interfere with the impugned order under Article 226 of the

Constitution of India, there being statutory alternative remedy, available to the petitioners.

5. It appears that the respondent-Bank filed an application u/s 19 of the Act, 1993 for recovery of alleged debt amount from the defendants,

including the petitioners herein. It was registered as Case No. O.A. 2 of 1997 by the Debts Recovery Tribunal, Patna. The following plea was

taken by the respondent-Bank, who was applicant before the Tribunal.

It was pleaded that a Company, in the name and style of Kumardhubi Engineering Works Limited, when became sick, the State of Bihar acquired

its assets for a consideration of Rs. 400 Crores, as was fixed by the Calcutta High Court. Later on, by an Act of Bihar legislature, the assets of

Kumardhubi Engineering Works Ltd. were transferred to BSIDC and, as such, a new Company; in the name and style of Kumardhubi Metal and

Casting Engineering Ltd. (hereinafter to be referred as the "Company") was instituted. The BSIDC entered into a joint venture with the TISCO in

order to revive and rehabilitate the unit. As per the terms of collaborations between BSIDC and TISCO, made on 1st May, 1985, it was decided

that BSIDC will hold 51% of the share whereas TISCO will hold 49% of the share. It was pleaded that the Company initially procured a term loan

of Rs. 225 lacs for industrial reconstruction from the Bank, which was repaid in full and, as such, the Bank released the titled deed, which was

earlier deposited for credit equitable mortgage. The case of the Bank was that the management of the Company was with the Group Companies of

TISCO. Further case of the Bank was that in the year, 1985 the Company approached the Bank of India for financial assistance and, as such, the

bank disbursed the credit facility in favour of the Company up to Rs. 150 lacs and inland career of Rs. 10 lacs on 5th September, 1985. A number

of documents, given below, were exhibited by the Company as security documents on 5th September, 1985.

(i) A demand promissory note for Rs. 150 Lacs;

(ii) Letter of continuing security; (iii) letter of lien and set up;

(iv) Hypothecation of tangible movable property;

(v) Charge and hypothecation of big debt; and

(vi) Undertaking on stamp paper dated 5th September, 1985 to create second charge over land, building, plant and machineries in favour of the

Bank.

Accordingly, a credit account was opened in the name of the company with the Bank for its operation.

6. Again, on the request of the Company, additional facility of letter of credit-documents against presentation of Rs. 200 lacs was sanctioned by

the bank in favour of the Company on 18th October, 1985, whereinafter, following loans were disbursed in favour of the Company :

(i) Cash credit facility and big debt for Rs. 80 lacs (raising from 150 lacs to 300 Lacs);

(ii) Inland guarantee of Rs. 40 lacs (raising from 10 lacs to 50 lacs); and

(iii) Letter of credit-inland documents against presentation and against acceptance and letter of credit touching a maximum of Rs. 200 lacs for both.

7. The Company, in its turn, executed documents on 6th November, 1986, such as :

(a) Demand Promissory Note for Rs. 50 lacs;

(b) Demand Promissory Note of Rs. 30 lacs;

(c) Letter of continuing guarantee for both advances, and

(d) Supplemental deed of hypothecation.

8. In the said petition, it was pleaded that on the request of the defendants, Additional working capital limit of Rs. 50 lacs was sanctioned and

disbursed on 8th December, 1986, making the total working capital of Rs. 280 lacs and following documents were executed on 8th December,

1986 itself.

(a) A demand Promissory Note for Rs. 50 lacs;

(b) Letter of continuing security; and

(c) Supplemental deed of hypothecation.

9. Thereafter, further request was made for enhancement of limit, which was allowed on 6th December, 1987, making a total limit of Rs. 320 lacs.

At that time also, certain instruments were executed on 6th December, 1987, such as :

(a) A Demand Promissory Note of Rs. 40 lacs;

(b) Letter of continuing security;

(c) Supplemental deed of hypothecation and an undertaking not to create a second charge over the immovable property.

10. The Bank further pleaded that the defendants executed renewal instruments from time to time on 6th February, 1987, 25th January, 1990, 2nd

August, 1991, 2nd May, 1994 and lastly on 25th April, 1995. It was alleged that during this period the management of the defendants was conducted by the TISCO and, as such, the conduct of account was satisfactory but the TISCO, later on, withdrew the support due to which the business activities of the Company stopped since October, 1995 and the Company started accumulation of loss. Large payments were made to the TISCO and the Bihar State Electricity Board as a result of which outstanding balance in the account of the Company with the Bank shot up from Rs. 14 lacs to Rs. 195 lacs within a period of one month, without any matching security in the form of current assets. The book debt statement indicated realization of the entire dues of Rs. 198 lacs from the TISCO but it was alleged that the amount was not deposited in the account of the Company with the bank and thereby, the Company and the petitioners violated the terms and conditions of the loan agreement. The Company opened current deposit account in the State Bank of India, Kumardhubi Branch, for payment of excise duty and thereby diverted Rs. 20 lacs to the accounts of the State Bank of India, though according to the Bank, there was no excise duty due, to be repaid. It was alleged that the Act of the Company and petitioners, who were defendants in the said case, was in violation of the terms and conditions of the loan agreement. The Bank further alleged that the company and the petitioners, who were defendants, started selling movable assets, such as, Stock, Stores, Spares etc. which were charged in favour of the applicant-Bank but the sale-proceeds were not deposited in the defendants' account with the applicant-Bank. It was pleaded that in-spite of repeated requests and reminders, made by the Bank, to regularize the account, the defendants of the case, including the company and the petitioners, not having paid any heed to it, the applicant-Bank was compelled to file the aforesaid suit for realization of Rs. 3,56,97,104.90 paise, inclusive of interest, calculated at the contractual rate up to the date of filing the suit.

11. It appears that in spite of notice, nobody appeared on behalf of the Company and the Bihar State Industrial Development Corporation Ltd. The petitioner TISCO of CWJC No. 3510 of 2000(P), who was defendant No. 3, appeared and filed show cause, but it was not accepted on the ground of not being filed by proper person. It was alleged that the petitioner TISCO of CWJC No. 3510 of 2000(P), later on, did not choose to

appear before the Tribunal and, as such, the case was taken up for ex-parte hearing against all the defendants.

12. Learned counsel for the petitioners made the following submissions, while challenged the impugned orders dated 1st February, 2000, passed

by the learned Presiding Officer, Debts Recovery Tribunal, Patna, in Case No. O.A. 2 of 1997 :

(a) Both the petitioners having different entity than the Company, they being the share holders, the application for recovery of debt amount was not

maintainable against them, the alleged amount having been taken by the Company from the bank, in question;

(b) The impugned order has been passed ex-parte, in violation of the Rules of Natural Justice, without proper notice and hearing the petitioners;

and

(c) The impugned order is not based on any ground, as the learned Presiding Officer, Debts Recovery Tribunal, Patna, without deciding the claim

i.e. what was the debt amount and whether the claim for realization of Rs. 3,56,9704.90 paise, inclusive of interests, was proper or not, allowed

the claim with cost and interest pendente lite and future at the rate of 12% per annum.

13. Both the writ petitions have been opposed by the learned counsel for the Bank mainly on the ground of alternative remedy. Learned counsel

for the respondent-Bank relying on the decisions of the Supreme Court, raised doubt relating to maintainability of the writ petitions.

Before deciding the issue, it is necessary to notice certain other things, as referred herein below.

The Company, Kumardhubi Metal Casting and Engineering Ltd., having become sick, the matter was referred to the Board For Industrial And

Financial Reconstruction (hereinafter to be referred as "B.I.F.R.") for the revival and rehabilitation. Various schemes were mooted out but they did

not materialized. Consequently, by an order dated 8th March, 1996, the B.I.F.R. recommended the Patna High Court to wind up and liquidate the

Company, the same being just and equitable and in the public interest. Two appeals were preferred against the recommendation, made by the

B.I.F.R. before the Appellate Authority for Industrial and Financial Reconstruction ("AAIFR" for short), which were registered as appeal Nos.

105 of 1996 and 5 of 1997. However, they were dismissed by common order dated 7th May, 1997.

On the recommendation of the B.I.F.R., a case being Company Petition No. 2 of 1996 was registered before Ranchi Bench of Patna High Court

in April, 1996. After admitting the matter, notice was published in the daily newspaper(s). Thereafter, no objection having been received from any

corner, Ranchi Bench of Patna High Court, in exercise of power under Sub-section (1) of Section 20 of the Sick Industrial Companies (Special

Provisions) Act, 1985 ordered to wind up the Company by its order dated 17th August, 1999. The Bank of India was appointed as operating

agency in course of enquiry by the B.I.F.R. Therefore, notice was issued by the High Court to the Bank of India. Curiously enough, Rank of India

appeared before the High Court but at that stage did not disclose that it had already preferred a suit before the Debts Recovery Tribunal, Patna,

registered as Case No. O.A. 2 of 1997. The Bank for the reasons, best known to it, also did not disclose the Debts Recovery Tribunal, Patna,

that a Company Petition had already been registered on the basis of the opinion of the B.I.F.R. Before issuance of the impugned order dated 1st

February, 2000, the Bank also failed to bring to the notice of the Debts Recovery Tribunal, Patna, that the High Court had already passed order

for winding up/liquidating the Company and had already appointed an official liquidator by its order dated 17th August, 1999.

14. From the order dated 17th August, 1999, passed by the High Court in C.P. No. 2 of 1996(R), it further appears that the Bank of India,

having been appointed as operating agency in course of enquiry by the B.I.F.R., was requested to Act as liquidator of the Company but the Bank

refused to be appointed as Liquidator of the Company. In such a situation, by the said order dated 17th August, 1999, passed by the High Court,

the official liquidator of the Court was appointed as liquidator of the Company, in question, and he was also directed to take possession of all the

assets of the said Company. The aforesaid fact is being highlighted as the Official Liquidator of the Court was not impleaded as a party-defendant

to the suit (Case No. O.A. 2 of 1997). The Company was noticed in the name and style of Kumardhubi Metal Casting and Engineering Limited,

but neither through the Managing Director or any of its Directors or any competent officer of the Company. Similarly notices were also issued on

two other defendants of the aforesaid suit, namely, Bihar State Industrial Development Corporation Ltd. and Tata Iron & Steel Company Ltd., but

none of those notices were issued either through the Managing Director or through any of the Director or any officer of these defendants. It is not

clear from the record as to whom the notices were served that is to say as to who received the notice(s)?

15. Counsel for the petitioners relied on a decision of the Calcutta High Court in the case of International Shipping Ltd. v. Chandpur Jute

Company Ltd., reported in (1982) 52 Comp Cas 121. In the said case, the company preferred a suit after winding up order was issued. The

Court held that after a company is wind up, it is only the official liquidator who becomes the custodian of all the assets and properties of the

company, which came into the custody of the Court u/s 456 of the Companies Act, 1956, read with Rule 233 of the Companies (Court) Rules,

1959 and in law and in fact, nobody else has the right to represent the company save and except the official liquidator.

16. As noticed above, in the present case, official liquidator was not impleaded as a party to represent the Company. Neither the Managing

Director nor any of the Directors or officers of the Company was impleaded as party-defendant to the suit, in question. The impugned order dated

1st February, 2000 was passed ex-parte without notice to them. I have noticed the Supreme Court's decision in the case of Allahabad Bank Vs.

Canara Bank and Another, . In the said case, the Supreme Court has discussed the jurisdiction of the Debts Recovery Tribunal and Recovery

Officer vis-a-vis a Company Court. The Supreme Court has held that even where a winding up petition is pending, or a winding up order has been

passed against the debtor Company, the adjudication of liability and execution of the certificate in respect of debt, payable to Banks and financial

institutions respectively are within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer. In such a case, the Company

Court's jurisdiction under Sections 442, 537 and 446 of the Companies Act stands ousted. No leave of Company Court is required for initiating

such proceeding under the Act, 1993 nor can the Company Court interfere with such proceedings.

The question of maintainability of a petition under Article 227 of the Constitution of India, challenging the order of Debts Recovery Tribunal fell for

consideration before the Supreme Court in the case of Punjab National Bank Vs. O.C. Krishnan and Others, . The Supreme Court held that even

though a provision under an Act can not expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless,

when there is an alternative remedy available, judicial prudence deems that the Court refrains from exercising its jurisdiction under the said

constitutional provisions.

Under the law, Section 18 of the Act, 1993 while bars jurisdiction of Civil Court and other Courts, clearly exempts the bar of jurisdiction in the

case of the High Court, in exercising its power under Articles 226 and 227 of the Constitution of India. In exceptional cases the High Court can

exercise its jurisdiction to entertain a petition under Article 226 and/or 227 of the Constitution against an order, passed by the Debts Recovery

Tribunal, even if there is an alternative remedy. But it can be exercised by the High Court only if it is found that the order, passed by the Tribunal is

without jurisdiction or arbitrary and principle of natural justice has been denied.

Section 19(4) of the Act, 1993 contemplates that the Tribunal after giving the applicant and the defendants" an opportunity of being heard, may

pass such order on the application as it thinks fit to meet the ends of justice. Admittedly the Debts Recovery Tribunal is a quasi-judicial authority

and is required to sub-serve the purpose of statute in consonance with the object and principle of natural justice. It appears from the order

impugned dated 1st February, 2000 that although notices were given it is not clear that on whom notices were served. The Tribunal though

observed that defendant No. 3 (TISCO herein) appeared and filed show cause, failed to discuss the stand, as was taken by defendant No. 3 in its

show cause. Though the Tribunal observed that on scrutiny it was found that it was not filed by proper person, the Tribunal failed to state as to

who was the proper person; the Managing Director or any of the Director or Officer, none of them having been impleaded as party defendant to

the suit in question; the TISCO has been made party defendant but not through the Managing Director or any of the Director or the officers of the

said Company. Thus, it can be safely held that the impugned order dated 1st February, 2000, passed by the learned Presiding Officer, Debts

Recovery Tribunal, Patna, in Case No. O.A. 2 of 1997 has been passed in

violation of the rules of natural justice.

In the case of Mrs. Janki Vashdeo Bhojwani and Another Vs. The Indusind Bank Limited and Others, , the Supreme Court having noticed that the

attached property was ordered to be auction sold without determination of the share in the attached property, while noticed that the Debts

Recovery Tribunal passed orders for the attachment of property and its subsequent sale without first determining the share of the appellants, held

the decision of the Debts Recovery Tribunal to auction the attached property illegal. The Supreme Court having noticed that the appellants of the

said case were neither debtors nor guarantors nor having mortgaged the property to the Bank, held that the High Court was wrong in not

determining the question of appellants's share first. That means the High Court was supposed to determine the issue.

17. In the case of The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others, the Supreme Court held

that

...When facts of the case brought before the High Court are such that High Court can itself correct the error, then it should pass appropriate

orders instead of merely setting aside the impugned order of the Tribunal and leaving very thing in vacuum.

That was a case in which ad-interim order was passed by the Debts Recovery Tribunal and it was observed that the High Court can interfere with

under Article 227 of the Constitution when the order is made without jurisdiction.

A writ Court can entertain a writ petition despite the existence of statutory remedy"" has been held by the Supreme Court in the case Whirlpool

Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . Now it is a settled law that in the case where the order is passed without

jurisdiction or in violation of the principles of natural justice and in cases where the order is arbitrary, it is always open to a writ Court to entertain a

writ petition, instead of refusal on the ground of alternative remedy.

18. In the present case, there is nothing on the record that the petitioner BSIDC or TISCO, who were defendants Nos. 2 and 3 respectively

before the Tribunal, took any loan from the Bank. From the pleadings, made by the Bank in Case No. O.A. 2 of 1997 it appears that vague

pleading has been made that the defendants i.e. defendants Nos. 1, 2 and 3, had

taken the amount from the Bank. But from a plain reading of the
plaint, it appears that the loan amount had been taken by the Company, in
question.

In the case of *Kanhai Lal v. State of Bihar and Ors.*, reported in 2002 (2) PLJR
553 a Division Bench of Patna High Court noticed that a

certificate proceeding for realization of electricity dues of a Company was
initialed against the Directors and Managing Director of the Company.

The Court held that any debt, payable by an incorporated Company can be
realized only by seizing the assets of the Company and not by putting

in prison the Managing Director or any of the officers of the Company. No
individual associated with an incorporated Company can be held liable

for the dues of the Company, which is a legal person having its own rights and
liabilities. That was also a case in which the respondents raised the

question of maintainability of the writ petition in view of alternative remedy but
the Court rejected such plea and held that the Court cannot compel

the party to exhaust the alternative remedy when the party cannot be treated as
a certificate debtor.

19. In the present case, as will be evident from the impugned order dated 1st
February, 2000, passed in Case No. O.A. 2 of 1997, the learned

Presiding Officer, Debts Recovery Tribunal, Patna, failed to determine the
question as to whether defendants Nos. 2 and 3 can be treated as

certificate debtors. No discussion has been made as to who took the loan amount
from the Bank, what is the exact amount actually taken by one

or other defendant, individually or jointly and what was the terms and conditions
on the agreement, including the interest, payable to the Bank.

Without discussing the aforesaid issues and without giving any ground, merely
because two of the defendants failed to appear, learned Presiding

Officer allowed the claim.

In the facts and circumstances, the impugned order dated 1st February, 2000,
not being a speaking order and being arbitrary, cannot be upheld.

The certificate(s) issued on the basis of such illegal order and other
consequential orders, including the impugned orders, passed by the Recovery

Officer, are also liable to be set aside, having been issued on the basis of an
illegal order. Accordingly, the impugned orders dated 1st February,

2000, passed by the Presiding Officer, Debts Recovery Tribunal, Patna, in Case

No. O.A. 2 of 2000 as also the order dated 7th February, 2000, passed by the said Tribunal, including the orders dated 14th July, 2000 and 28th August, 2000, both passed by the Recovery Officer, Debts Recovery Tribunal, Patna, in Recovery Proceeding No. 17 of 2000, are hereby set aside. The case is remitted back to the Presiding Officer, Debts Recovery Tribunal, Patna, to decide the issue afresh after impleading the necessary parties and notice to the defendants. Before passing final order, the Tribunal will bear in mind that an official liquidator had already been appointed by the High Court as a receiver of the Company, in question. Both the writ petitions are hereby allowed. However, there will be no order as to costs.

20. In view of the aforesaid findings, no separate order is required to be passed on I.A. No. 505 of 2005, filed in C.P. No. 2 of 1966(R).