

(2012) 08 BOM CK 0114

In the Bombay High Court

Case No : Writ Petition No. 5554 of 2012 with Civil Application No. 1602 of 2012

Tushar P. Shah

APPELLANT

Vs

International Asset Reconstruction Co. P. Ltd. and Others

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 3, Order 21 Rule 48, 19, 38, 39

Citation : (2013) 2 ALLMR 89 : (2013) 1 BC 502 : (2012) 6 BomCR 200 :
(2013) 2 MhLj 768

Hon'ble Judges : V.K. Tahilramani, J

Bench : Single Bench

Advocate : S.C. Naidu with Mr. Jay Choksi instructed by L.R. Castelino, for the Appellant; B.S. Colabawala with Mr. Nikhil Rajani instructed by . V. Deshpande and Co., for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard the learned counsel for the petitioner and the learned counsel for the respondent No. 1. Counsel for the petitioner has submitted that the petitioner is one of the director and guarantor of the respondent No. 2. Respondent No. 1 is a Securitization Company duly registered and incorporated under the Companies Act, 1956 and assignee of the original applicant, Bank of Baroda, Chandravarkar Branch, Matunga, Mumbai. Respondent No. 3 is a company incorporated under the Companies Act, 1956 and a principal borrower of the respondent No. 1. Respondent No. 4 and respondent No. 5 are guarantors of respondent No. 2.

2. Counsel for the petitioner has submitted that the Bank of Baroda, the lender bank of the respondent No. 2, has filed a suit before this Court being Suit No. 5568 of 1998, during the pendency of the suit The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB & FI Act) came into force and therefore the suit was transferred to the Debt Recovery Tribunal (DRT) and numbered as Original Application No. 1661 of 1999. The said Original Application

was finally heard and decided by the DRT by issuing recovery certificate dated 7.2.2003. In pursuance thereof proceedings have been initiated being Recovery Proceedings No. 42 of 2003.

3. It is contended that Certificate Debtor Nos. 3 and 4 have taken out an application inter alia praying for modifying the recovery certificate so 3/16 as to order the petitioner to contribute his part of the share, accordingly the DRT modified the recovery certificate on 21.5.2004.

4. Counsel for the petitioner has contended that the petitioner could not participate in the recovery proceedings, however, in the month of February 2006 the petitioner came to know about the sale of the immovable property situated at Mumbai and Vapi. Petitioner filed an application to set aside the sale. The Recovery Officer after hearing all the parties set aside the sale vide order dated 16.10.2006. The said order of the Recovery Officer was challenged by the petitioner as well as the purchaser before the DRT-II Mumbai. DRT-II Mumbai dismissed the proceedings initiated by the petitioner and allowed the appeal filed by the purchaser vide common judgment delivered on 22.4.2010. The petitioner being aggrieved by the same, challenged the order dated 22.4.2010 passed by the DRT-II Mumbai before Debt Recovery Appellate Tribunal Mumbai (DRAT Mumbai), which is pending for hearing and final disposal.

5. Counsel for the petitioner has submitted that while the appeal filed by the petitioner was pending before DRAT Mumbai, the respondent No. 1 being the assignee initiated attachment of immovable property 4/16 identified by the respondent No. 1 for valuation and sale of the identified property in which the petitioner has actively participated. It is contended that at the time of fixing the sale programme, the Recovery Officer DRT-II Mumbai informed the respondent No. 1 that in view of the administrative directions given by the Presiding officer DRT-II Mumbai the recovery certificate cannot be executed and is required to be transferred to DRT Ahmedabad since the immovable property is situated at Vapi which is within the jurisdiction of DRT Ahmedabad.

6. It is contended that the respondent No. 1 moved DRT-II Mumbai for urgent directions. DRT-II Mumbai vide order dated 9.2.2012 has held that the Recovery Officer DRT-II Mumbai will execute the recovery certificate in Recovery Proceedings No. 42 of 2003 and shall proceed against the property situated in Vapi, State of Gujarat, in accordance with law to recover the amount indicated in the recovery certificate. The petitioner being aggrieved by the order dated 9.2.2012 passed by the DRT-II Mumbai filed an appeal u/s 20 of the RDDB & FI Act before the DRAT Mumbai bearing Misc. Appeal No. 55 of 2012. The appeal was dismissed by the DRAT Mumbai on 1.5.2012. The petitioner being aggrieved by the said order filed the present writ petition.

7. Counsel for the petitioner has contended that the property to be auctioned and sold in execution of recovery certificate is situated beyond the jurisdiction of DRT-II Mumbai, the recovery certificate should be transferred to DRT Ahmedabad

within whose territorial jurisdiction the property in question is situate. It is further contended that the Presiding Officer DRT-II Mumbai relying on the provisions u/s 19(23) of the RDDB & FI Act has held that both the DRTs i.e. DRT Ahmedabad and DRT-II Mumbai have jurisdiction to get the recovery certificate executed by their Recovery Officers. It is contended that the view expressed by the DRT-II Mumbai is erroneous and unsustainable since it is not in conformity with the provisions of Section 19(23) of the RDDB & FI Act. It is contended that the provisions of Section 19(23) of the RDDB & FI Act does not deal with the situation where the property involved in recovery proceedings exclusively situate within the jurisdiction of another DRT than the DRT who has issued recovery certificate. It is contended that Section 39(1)(c) of the CPC (Code) contemplates that where the decree directs the sale or delivery of immovable property situated outside the local limits of the jurisdiction of the Court which has passed the decree, the court which has passed the decree may transfer the same to the court for execution within whose jurisdiction the property is situated. It is contended that after the amendment to Section 39 of the Code, clause (4) was added which specifically provides that where a decree to be executed against the property which is situated outside the local limits of the court which has passed the decree, the court which has passed the decree cannot execute the decree. Counsel for the petitioner therefore contended that it is well settled that where a decree is to be executed in respect of the property situated beyond the jurisdiction of the court which has passed the decree, the court which has passed the decree has no power to execute the decree and has to transfer the decree to the other court for execution within whose jurisdiction the property is situated. Counsel for the petitioner further contended that same analogy is applicable in respect of the jurisdiction of the Tribunal in case of execution of recovery certificate. In order to substantiate his contention, reliance is placed on the decision of the Apex Court in case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, . The relevant observations are in paragraph 7, which reads thus :

There cannot be any dispute over the proposition that the court which passed the decree is entitled to execute the decree. This is clear from Section 38 of the Code which provides that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 42 of the Code indicates that the transferee court to which the decree is transferred for execution will have the same powers in executing that decree as if it had been passed by itself. A decree could be executed by the court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorised by Order 21 Rule 3 or Order 21 Rule 48 of the Code or the judgment-debtor is within its jurisdiction, if it is a decree for personal obedience by the judgment-debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the court which passed the decree acting as the executing court, there was a conflict of views earlier, some courts taking the view that the court which passed the decree and which is approached for execution

cannot proceed with execution but could only transmit the decree to the court having jurisdiction over the property and some other courts taking the view that it is a matter of discretion for the executing court and it could either proceed with the execution or send the decree for execution to another court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 1.7.2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 of the Code shall be deemed to authorise the court to proceed with the execution. In the light of this, it may not be possible to accept the contention that it is a matter of discretion for the court either to proceed with the execution of the decree or to transfer it for execution to the court within the jurisdiction of which the property situate.

8. Counsel for the petitioner has submitted that provision of Section 19(23) of the RDDB & FI Act is almost analogous to the provisions of Section 39 of the Code and since there is no impediment, the Tribunal should have applied the provisions of Section 39 of the Code in respect of the case in hand since DRT Ahmedabad alone has jurisdiction to execute recovery certificate in view of the provisions of Section 39(4) of the Code since the property in question is situated within the jurisdiction of DRT Ahmedabad. It is therefore contended that the DRT-II Mumbai has no jurisdiction to get the recovery certificate executed and it was obligatory on the part of DRT-II Mumbai to transfer the recovery certificate to DRT Ahmedabad which is alone competent to execute the same.

9. Counsel for the respondent No. 1 on the other hand supported the impugned order passed by the DRAT Mumbai and contended that the provisions of Section 19(23) of the RDDB & FI Act are directory and discretion is with the Presiding Officer of DRT which has issued the recovery certificate to get it executed from his own recovery officer or he can send the copy of the recovery certificate to the other Tribunal for execution within whose jurisdiction the property is situated. Counsel for the respondent No. 1 further contended that as regards the provisions of Section 39(4) of the Code is concerned, it is a specific provision which stipulates that if the property is situated beyond the jurisdiction of the court which has passed the decree, the court which has passed the decree has no power to execute the decree. Whereas Section 19(23) of the RDDB & FI Act is a self contained statute which stipulates procedure for execution of the recovery certificate where the property to be dealt with under the recovery certificate is situated beyond the jurisdiction of the DRT which has issued the recovery certificate. Counsel for the respondent No. 1 has contended that the issue is covered by the decision of the Division Bench of the Gujarat High Court in case of Bank of Baroda Vs. Balbir Kumar Paul and Others, and in view of the law declared by the Gujarat High Court, the impugned order is sustainable in law and petition is liable to be dismissed.

10. We have considered the contentions canvassed by the respective counsel, perused the decision of the Gujarat High Court, considered the provisions of

Section 19(23) and 22 of the RDDB & FI Act, as well as, provisions of Section 38 and sub section (4) of Section 39 of the Code. The question which fell for the consideration before the Appellate Tribunal was....

Whether DRT-II Mumbai can get the recovery certificate executed by its recovery officer in respect of the property situate at Vapi in the State of Gujarat which is beyond the local limits of DRT-II Mumbai in view of sub section (23) of Section 19 of the RDDB & FI Act or it is mandatory for DRT-II Mumbai to send the copy of recovery certificate to DRT Ahmedabad for execution thereof in view of provisions of Sections 38 and 39 of the Code.

11. It is no doubt true that sub section (23) of Section 19 of RDDB & FI Act as well as Section 38 of the Code provides that a decree may be executed either by the court which has passed it or by the court to which it is sent for execution. Whereas Section 39 of the Code lays down the condition under which the decree can be sent. Section 39(1) reads:

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction.

The plain reading of the provision would show that the use of the word "may" in Section 39(1) of the Code demonstrates that in a given case the court which has passed a decree may send it for execution to another court of competent jurisdiction if the application is submitted in this regard by the decree-holder. However, it will be appropriate, at this stage, to consider the provisions of sub section (4) of Section 39 of the Code, which reads :

Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.

The provisions of sub section (4) of Section 39 of the Code makes it explicitly clear that the court which has passed a decree in respect of the property situated outside the local limits of its jurisdiction does not have power to execute the same in relation to such property.

12. Gujarat High Court in case of Bank of Baroda (cited supra) considered these issues and in paragraphs 15, 15.1 and 16 has observed thus :

15. Bearing in mind the above principles of statutory interpretation, and also objects for which the said Act was enacted, we find it difficult to hold that the term "may" used in sub-section(23) of Section 19 should be read as "shall" or that the provision for forwarding the recovery certificate to another tribunal within whose jurisdiction the property may be situated as mandatory and not enabling. Accepting the ordinary language used in the said section does not frustrate the said provision or the object sought to be achieved. On the contrary insisting on treating such a requirement as mandatory would lead to further delay in execution of a decree which may have been passed by the tribunal long back.

15.1 In comparison to the said provision contained in sub-section(23) of Section 19 of the said Act, Section 38 of the CPC provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 39 of the CPC pertains to transfer of a decree. Sub-section(1) of Section 39 of the CPC provides inter-alia that the Court which passed a decree may on the application of the decree holder send it for execution to another Court of competent jurisdiction, if any of the conditions laid down therein is specified. One of the conditions is that if the decree directs the sale or delivery of the immovable property situated outside the local limits of the jurisdiction of the Court which passed it. We are conscious that here also though the word used is "may", however, entire issue has been put beyond any controversy by providing in sub-section(4) of Section 39 that :

S. 39(4) Nothing in this section shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.

16. In the said Act there is no such provision as found in sub-section(4) of Section 39 of the Code of Civil Procedure. In view of this significant difference, reliance on the language in Sections 38 and 39 of the CPC or various rules under Order 23 thereof would not further the case of the original petitioner. Decision in case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, was rendered in view of provisions of Code of Civil Procedure. It was in this background that the Apex Court observed that the decree could be executed by the Court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorized by Order XXI Rule 3 or Order 21 Rule 48 of the Code.

13. We concur with the view expressed by the Gujarat High Court. The contention of the petitioner that term "may" used in sub section (23) of Section 19 of the RDDB & FI Act should be read as "shall" suffers from lack of merit in view of the legislative intent and objective to be achieved by RDDB & FI Act. The Act has been introduced to provide speedy remedy for recovery of debts. The legislature, therefore, in its wisdom thought it expedient to provide special remedy for recovery of debts. The prime object of the establishment of Debts Recovery Tribunal is to provide expeditious adjudication of recovery of debts due to banks and financial institutions, therefore, Section 22 of the RDDB & FI Act has clothed the Tribunal with the power to regulate its own procedure guided by the principles of natural justice and is not bound by the procedure laid down by the Code of Civil Procedure. It is no doubt true that there is no bar for the Tribunal to take recourse to the procedure laid down by the Code, however, as per the provisions of Section 22 of the RDDB & FI Act it is not bound by the procedure laid down by the Code and therefore the contentions canvassed by the counsel for the petitioner even on this count must fail and the decision in case of Mohit Bhargava cited by the petitioner does not further the case of the petitioner. In view of this legal position, the contentions canvassed by the counsel for the petitioner have no force and the findings recorded by the DRAT Mumbai are just,

proper and sustainable in law. For the reasons stated herein above, petition suffers from lack of merits. Same is dismissed. No order as to costs. In view of the dismissal of the petition, civil application does not survive, same is also dismissed.