

Shalini Asha Chopra Vs. Chairperson Debts Recovery Appellate Tribunal

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SooperKanoon Citation : sooperkanoon.com/1115608

Court : Allahabad

Decided On : Sep-03-2012

Judge : Dilip Gupta

Appeal No. : Civil Misc. Writ Petition No. 38143 of 2012

Appellant : Shalini Asha Chopra

Respondent : Chairperson Debts Recovery Appellate Tribunal

Judgement :

1. The borrower and the guarantors of the financial assistance granted by the State Bank of India have filed this petition for quashing the order dated 2nd April, 2012 passed by the Debts Recovery Tribunal, Allahabad by which the application filed by M/s. Kotak Mahindra Bank Ltd. (hereinafter referred to as the 'Kotak Mahindra Bank') for its substitution in place of the State Bank of India in the recovery certificate on the basis of the assignment deed dated 29th March, 2006 has been allowed. The petitioners have also sought the quashing of the order dated 11th May, 2012 passed by the Debts Recovery Appellate Tribunal by which the appeal filed by the petitioners for setting aside the aforesaid order of the Debts Recovery Tribunal has been dismissed.

2. It transpires from the records of the writ petition that petitioner no.3- M/s. Chopra Fabricators and Manufacturers Pvt. Ltd., which is engaged in fabrication and manufacturing work, was granted financial assistance by the State Bank of

India with petitioner nos.1 and 2 as the guarantors of the loan and for this purpose a mortgage by deposit of title deed of House No.17/23, Kamla Nehru Road, Allahabad was executed. The account of the borrower firm became irregular and the State Bank of India filed Suit No.535 of 1993 against the petitioners for recovery of a sum of Rs.1,41,71,528.57 together with cost and pendentelite and future interest @ 16.5% per annum with quarterly rests from the date of filling of the suit till full realisation. The suit was transferred to the Debts Recovery Tribunal, Allahabad and was registered as Transfer Application No.112 of 2000. It is during the pendency of the Transfer Application that a deed of assignment was executed between the Kotak Mahindra Bank (assignee) and the State Bank of India (assignor) on 29th March, 2006. Under Clause 1.2.1 of the deed, the assignee acquired from the assignor all the assignors right, title, interest in the debts and the financial instruments and the assignor became the legal and beneficial owner entitled to demand, receive and recover the debts in its own name and right. Under Clause 1.2.2 of the deed, all legal proceedings by the assignor relating to the debts and pending on the date were assigned to the assignee and were to continue as per the directions of the assignee at the cost and risk of the assignee and could be enforced by the assignee. It was further provided that on such transfer, the assignee shall stand subrogated in place of the assignor in respect of the debts. Clause 2.4.1 of the deed further provides that the assignee shall have the sole and absolute right of collecting all amount representing the debts in such manner as the assignee in its absolute discretion determines. Clause 2.4.1 of the deed also provides that the assignee shall have all the rights under the decree, if any, issued by any Court or Tribunal in favour of the assignor in respect of the debts as if they were issued in favour of the assignee and under Clause 2.4.5 of the deed the assignee was entitled to the security available for due repayment of the debts.

The State Bank of India, accordingly, sent a letter dated 29th March, 2006 to the petitioners informing them of the aforesaid deed of assignment. Kotak Mahindra Bank did not take any steps for getting itself impleaded on the basis of the assignment deed during the pendency of the Transfer Application and when the Transfer Application No.112 of 2000 came up for hearing on 10th May, 2006 before the Debts Recovery Tribunal, an application was filed by the petitioners

(defendants in the said Transfer Application) for dismissal of the Transfer Application as the State Bank of India had had no interest left after the execution of the assignment deed in favour of Kotak Mahindra Bank. This application was rejected by the Debts Recovery Tribunal by the order dated 10th May, 2006 and the Tribunal heard the Transfer Application on merits. Thereafter, by the order dated 12th May, 2006, the Tribunal allowed the Transfer Application for issuance of recovery certificate of Rs.1,41,74,520.37 together with interest @ 16.5% per annum with quarterly rest from the date of filing of the suit till the full realisation subject to the adjustment of the admitted deposit of Rs.25 lacs under the One Time Settlement Scheme with the Bank.

A debt recovery certificate was, accordingly, issued which was numbered as DRC No.97 of 2006. Kotak Mahindra Bank then filed a substitution application on 2nd November, 2006 for substitution of its name in place of the State Bank of India and prayed that all the benefits arising out of the judgment of the Debts Recovery Tribunal be granted to it in view of the assignment deed dated 29th March, 2006 executed by the State Bank of India in favour of Kotak Mahindra Bank. This application was allowed by the Debts Recovery Tribunal on 13th July, 2007. The petitioners filed an appeal before the Debts Recovery Appellate Tribunal as the substitution application had been allowed without issuing any notice to the petitioners. This appeal was allowed by the order dated 16th October, 2008 and the order dated 13th July, 2007 passed by the Debts Recovery Tribunal was set aside. The appellants-petitioners were granted time to file a reply to the substitution application and the Debts Recovery Tribunal was directed to dispose of the application expeditiously. The petitioners filed objections to the substitution application asserting that the application should be rejected for the reason that the assignment deed was executed on 29th March, 2006 during the pendency of the Transfer Application but Kotak Mahindra Bank did not move any application prior to the passing of the decree on 12th May, 2006 and it is only after the decree was passed that the application for substitution was filed.

3. The Debts Recovery Tribunal allowed the substitution application by the order dated 2nd April, 2012. The petitioners filed an appeal before the Debts Recovery Appellate Tribunal which was dismissed by the order dated 11th May, 2012. The

order dated 2nd April, 2012 passed by the Debts Recovery Tribunal and the order dated 11th May, 2012 passed by the Debts Recovery Appellate Tribunal have been assailed in this petition.

Sri Ravi Kant, learned Senior Counsel appearing for the petitioners assisted by Sri Kushal Kant submitted that since Kotak Mahindra Bank had filed the application on 2nd November, 2006 for substitution of its name in the recovery certificate after the Debts Recovery Tribunal had allowed the Transfer Application No.112 of 2000 on 12th May, 2006 and not during the pendency of the Transfer Application, it cannot be substituted on the basis of the assignment deed executed on 29th March, 2006 and in support of his contention he has placed reliance upon the decision of the Supreme Court in Jugalkishore Saraf Vs. M/s. Raw Cotton Co. Ltd., AIR 1955 SC 376. Learned Senior Counsel also submitted that the substitution application could not have been allowed in view of the order dated 10 th May, 2006 passed by the Debts Recovery Tribunal by which the application filed by the petitioners for dismissal of the transfer application was rejected. It is, therefore, his contention that the Debts Recovery Tribunal as well as the Debts Recovery Appellate Tribunal committed an illegality in allowing the substitution application.

4. Sri O.P. Mishra, learned counsel appearing for Kotak Mahindra Bank has, however, supported the impugned orders and has submitted that in view of the terms and conditions contained in the assignment deed and the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'Securitisation Act'), the Debts Recovery Tribunal committed no illegality in allowing the application filed by Kotak Mahindra Bank. He also submitted that the decision of the Supreme Court in Jugalkishore Saraf (supra) will not help the petitioners. He has also placed before the Court the decision of the Supreme Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Limited and Ors., (2010) 10 SCC 1 and has submitted that such assignment by the State Bank of India in favour of Kotak Mahindra Bank was permissible under the Banking Regulation Act, 1949 (hereinafter referred to as the 'Banking Regulation Act'). Sri Jayant Banerjee, learned counsel appearing for the State Bank of India has supported the submissions advanced by Sri O.P. Mishra. I have considered the submissions

advanced by the learned counsel for the parties.

The petitioners were defendants in Transfer Application No.112 of 2000 which was filed by the State Bank of India against the said defendants. The Transfer Application was allowed on 12th May, 2006 and a recovery certificate of Rs.1,41,74,528.37/- was issued with interest @ 16.5% per annum with quarterly rest from the date of filing of the case till the full realisation from the defendants.

It was during the pendency of the aforesaid Transfer Application that the State Bank of India had executed the assignment deed in favour of Kotak Mahindra Bank on 29th March, 2006. Kotak Mahindra Bank, however, did not file any application for impleading itself during the pendency of the Transfer Application before the Debts Recovery Tribunal and it is only after the Transfer Application was allowed and the recovery certificate was issued that Kotak Mahindra Bank filed an application for its substitution in place of the State Bank of India in the Recovery Certificate. This application was allowed by the Debts Recovery Tribunal and the appeal filed by the petitioners before the Debts Recovery Appellate Tribunal to assail the said order was dismissed.

5. The contention of learned Senior Counsel appearing for the petitioners is that since the application for substitution was filed by Kotak Mahindra Bank after the Transfer Application was decreed, it could not have been allowed by the Debts Recovery Tribunal and in support of his contention he has placed reliance upon the decision of the Supreme Court in Jugalkishore Saraf (supra). Before advertent to the decision of the Supreme Court in Jugalkishore Saraf (supra) it would be appropriate to refer to the decision of the Supreme Court in ICICI Bank (supra) which has been relied upon by learned counsel for the respondents.

6. In ICICI Bank (supra) the Supreme Court examined whether inter se transfer of non-performing assets by Banks is illegal in the light of the provisions of the Banking Regulation Act. The Gujarat High Court had held that assignment of deed by a Bank, inter se is not an activity which is permissible under the Banking Regulation Act and consequently all the executed contracts of assignment of debts were declared illegal. It was also held by the High Court that the assignee banks were not entitled to substitution in place of the assignor in proceedings relating to

companies in liquidation pending in the Company Court.

In this matter before the Supreme Court Rs.52.45 Crores was the principal amount outstanding under the trade credit facility which was payable by the borrowers to the assignor-ICICI Bank Ltd. The assignor Bank had agreed to sell to the assignee Bank i.e. Kotak Mahindra Bank all debts together with interest under the deed of assignment dated 31st March, 2006. Clause 2.2 of the said assignment deed executed between ICICI Bank and Kotak Mahindra Bank referred to in the judgment is as follows:-

"2.2 On and from the date of the Agreement the Assignee and the Assignor hereby agree, undertake and confirm that notwithstanding

(i) the costs, charges, expense, taxes and duties to be paid or incurred by the Assignee towards the realization of the Debt; and

(ii) any settlement or compromise or restructuring of the Debt or the status of the Debt or creditworthiness of the Clients, the amounts to be paid by the Assignee towards Purchase Consideration in terms of the Agreement shall remain irrevocable and unconditional obligation of the Assignee hereof:

2.2.1 The Assignee shall have the sole and absolute right of collecting all amounts representing the Debts in such manner as the Assignee may in its absolute discretion determines;

2.2.2 The Assignor shall not be subject to any duties and/or obligations in respect of the Financial Instruments;

2.2.3 The Assignee shall have all the rights and obligations under the Financial Instruments as if they were executed by the Clients in favour of the Assignee."

Kotak Mahindra Bank filed an application for substitution in place of the original secured creditor ICICI Bank at the stage of the provisional/final winding up proceedings pursuant to the deed of assignment dated 31st March, 2006. The Company Court held that Kotak Mahindra Bank did not acquire the rights through the process known in law and, therefore, could not be substituted in place of ICICI

Bank Ltd. The High Court upheld the order of the Company Court only on the ground that the assignment of the proposed Bank was not an activity permissible under the Banking Regulation Act and consequently the deed was held to be illegal and it was declared that the assignee Bank was not entitled to be substituted in place of the assignor Bank.

7. The Supreme Court analyzed the various provisions of the Banking Regulation Act, the guidelines issued by the Reserve Bank of India and the assignment deed and observed as follows:-

"43. One more aspect needs to be kept in mind. In this batch of cases we are dealing with assets in the hands of banks. NPAs are "account receivables". The impugned guidelines show that RBI considers inter se NPA assignment between banks to be a tool for resolving the issue of NPAs and in the interest of banking policy under Section 21 of the BR Act, 1949. The object is to minimise the problem of credit risk. The corporate debt restructuring is one of the methods for reducing NPAs. Thus, such restructuring as a matter of banking policy cannot be treated as "trading". One has to keep in mind the object behind enactment of the BR Act, 1949. Thus, the said guidelines fall under Section 21 of the 1949 Act. These guidelines are a part of credit appraisal mechanism. Thus, in our view the impugned guidelines are not ultra vires the BR Act, 1949. Dealing in NPAs as part of the credit appraisal mechanism and as a part of restructuring mechanism falls within Section 21 read with Section 35A of the Act. Hence, it cannot be said that "transfer of debts/NPAs" inter se between banks is an activity which is impermissible under the 1949 Act. The BR Act, 1949 is an Act enacted to consolidate and amend the law relating to banking. Thus, while interpreting the Act one needs to keep in mind not only the framework of the banking law as it stood in 1949 but also the growth and the new concepts that have emerged in the course of time.

44. Thus, in our view on reading the provisions of the BR Act, 1949 with the guidelines of RBI issued from time to time in relation to advances and restructuring/management of NPAs we are of the view that the BR Act, 1949 is a complete code on banking and that dealing in NPAs inter se by the banks needs to

be looked in the larger framework of "restructuring of banking system". Thus, we need not go into the provisions of the said TP Act. In fact, it is the case of the borrower(s) that provisions of the said TP Act has no application.

45. In the alternative, since the borrower(s) has relied on Section 130 of the said TP Act, one needs to analyse the contentions raised in that regard. According to the borrower(s) assignment of financial instruments in possession of ICICI Bank Ltd. to Kotak Mahindra Bank Ltd. transfers not merely the right to recover the debt but also transfers the obligations under the financial instruments "as if they were executed by the clients of ICICI Bank in favour of the assignee", i.e., Kotak Mahindra Bank Ltd. According to the borrower(s), an assignment of a debt can never carry with it the assignment of the obligations of the assignor unless there is a novation of the contract by all parties. Therefore, according to the borrower(s), the impugned deed of assignment is legally unsustainable without novation of original contract between ICICI Bank Ltd. (assignor) and the borrower(s) (assignee). We find no merit in the above arguments.

46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes non-performing asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd.(assignee).

47. At this stage, we wish to once again emphasise that debts are assets of the assignor Bank. The High Court(s) has erred in not appreciating that the assignor Bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned deed of assignment transfers any obligations of the assignor towards the assignee.

48. In *Khardah Company Ltd. v. Raymon and Co. (India) Private Ltd.* reported in (1963) 3 S.C.R. 183 the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well-recognised distinction between the two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

49. In *Camdex International Ltd. v. Bank of Zambia* reported in (1998) Q.B. 22 (CA) the following observation which is relevant to the present case needs to be quoted:

"The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit. Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, Hobhouse L.J. observed, commercial entities would never purchase debts." Similarly, the following proposition in *Chitty on Contracts*, 27th edn.(1994) at para

19.027 is relevant to be noted:

50. "It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or 'selling' debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise. "

51. In view of the above exposition of law, we find that under the impugned deed of assignment only the account receivables in the books of ICICI Bank Ltd. has been transferred to Kotak Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation/mortgage have not been assigned by ICICI Bank Ltd. to the assignee Bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned deed of assignment is unsustainable in law. The obligations referred to in the impugned deed of assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs. For example, when an account receivable is treated as NPA and assigned to the assignee bank, the parties have to follow certain guidelines issued by RBI. If there is a breach of the guidelines or statutory directions issued by RBI by assignor in regard to transfer of NPA then the assignee Bank can enforce such obligations vis- a-vis the assignor Bank. It is these obligations which are referred to in the impugned deed of assignment. That, an account receivable becomes an NPA only because of the default committed by the borrower(s) who fails to repay. Lastly, it may be mentioned that the said SARFAESI Act, 2002 was enacted enabling specified SPVs to buy the NPAs from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case.

52. Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the "transfer of account receivable" from one bank to the other."

(emphasis supplied)

It is, therefore, clear from the aforesaid decision of the Supreme Court in ICICI Bank (supra) that an outstanding in the account of a borrower is a debt due and payable by the borrower to the Bank. The Bank is the owner of the debt and such debt is an asset in the hands of the Bank as a secured creditor or mortgagee and the Bank can always transfer its assets which transfer in no way affects any right or interest of the borrower. The non performing assets are created on account of the breach committed by the borrower and, therefore, the borrower cannot seek opportunity to participate in the "transfer of account receivable" from one Bank to the other.

8. Learned Senior Counsel for the petitioners has placed reliance upon the decision of the Supreme Court in Jugalkishore Saraf (supra). The said decision has been distinguished by the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal and the learned counsel appearing for the respondent-Kotak Mahindra Bank has also submitted that this decision will not come to the aid of the petitioners.

It is, therefore, necessary to refer to the decision of the Supreme Court in Jugalkishore Saraf (supra) in detail. A suit was instituted by the firm- Habib and Sons in 1948 against the appellant Jugal Kishore Saraf for recovery of Rs.7113.70. When the suit was pending, a document was executed on 7th February, 1949 whereby it was agreed that the two partners of the firm would transfer and M/s. Raw Cotton Company Ltd. (respondent- Company) would accept the transfer of all books and other debts due to them in connection with their business in Bombay and full benefit of all other property to which they were entitled in connection with the said business. The respondent-Company did not take steps under Order 22 Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') for getting themselves substituted as plaintiffs in place of the firm-Habib and Sons and the suit continued in the name of the original plaintiffs and the decree was passed in December, 1949. It was subsequently on or about 25th April, 1951 that the respondent-Company filed an application for execution of the decree under Order 21 Rule 11 CPC on the basis of the deed of assignment dated 7th February, 1949. The executing Court gave leave to the respondent-Company to execute the decree. The judgment debtor

filed an appeal to the High Court which was dismissed and the Letters Patent Appeal preferred before the High Court was also dismissed. The matter went to the Supreme Court before a Constitution Bench of three Hon'ble Judges. Each of the three Hon'ble Judges gave separate judgments to dismiss the Appeal. Justice S.R. Das observed as follows:-

"6. It is quite plain that if O. 21, R. 16 is thus construed the respondent company cannot possibly contend that the decree now sought to be executed by them was, after its passing, transferred to them by an assignment in writing within the meaning of that rule, for the document in question was executed on the 7-2-1949 but the decree was passed subsequently on the 15-12-1949. Whether they can claim to have become the transferees of the decree after it was passed by operation of law within the meaning of this rule or to have otherwise become entitled to the benefit of it is a different matter which will be considered later on. For the moment it is enough to say that there had been no transfer of the decree to the respondent company by any assignment in writing executed after the decree was passed, as contemplated and required by O. 21, R. 16.

8. I am unable to accept this line of reasoning. It cannot be overlooked that there was no mention in that document of any suit or decree to be passed in that suit as one would have expected if the parties really intended to transfer the future decree also.

The transfer of the debt passed all the interest which the transferors were then capable of passing in the debt and in the legal incidents thereof. There was then no decree in existence and, therefore, the transferors could not then pass any interest in the non-existing decree. Therefore, section 8 of the Transfer of Property Act does not assist the respondent company. Upon the assignment of the debt the respondent company undoubtedly became entitled to get themselves substituted under O. 21, R. 10 as plaintiffs in the pending suit but they did not choose to do, so and allowed the transferors to continue the suit and a decree to be passed in their favour. The true position, therefore, is that on the date of the transfer of the debt to the respondent company the transferors could not transfer the decree, because the decree did not exist.

37. There is another ground on which the right of the respondent company to maintain the application for execution has been sought to be sustained. This point was not apparently taken before the High Court and we have not had the advantage and benefit of the opinion of the learned Judges of that Court. Section 146 of the Code of Civil Procedure on which this new point is founded provides as follows:

"146. Proceedings by or against representatives. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him".

38. The main thing to, ascertain is as to whether the respondent company had any right, title or interest in the decree and whether they can be said to be persons claiming under the decree- holder. 39. I have already held that the document under consideration did not transfer the future decree and, therefore, the equitable principle did not apply and, therefore, the respondent company did not become a transferee of the decree within the meaning of O. 21, R. 16. What, then, was the legal position of the respondent company? They had undoubtedly, by the document of the 7th February 1949, obtained a transfer of the debt which was the subject matter of the then pending suit. This transfer, under the Transfer of Property Act, carried all the legal incidents and the remedies in relation to that debt. The transferors no longer had any right, title or interest in the subject-matter of the suit. After the transfer it was the respondent company which had the right to continue the suit and obtain a decree if the debt was really outstanding. They, however, did not bring themselves on the record as the plaintiffs in the place and stead of the transferors but allowed the latter to proceed with the suit. The transferors, therefore, proceeded with the suit although they had no longer any interest in the debt which was the subject matter of the suit and which had been transferred by them to the respondent Company. In the premises, in the eye of the law, the position of the transferors, vis-a-vis the respondent company, was nothing more than that of benamidars for the respondent company and when the decree was passed for the recovery of that debt it was the respondent company who were

the real owners of the decree. As between the respondent company and the transferors the former may well claim a declaration of their title. Here there is no question of transfer of the decree by the transferors to the respondent company by assignment of the decree in writing or by operation of law and the respondent company cannot apply for execution of the decree under O. 21, R. 16. But the respondent company are, nonetheless, the real owners of the decree because it is passed in relation to and for the recovery of the debt which undoubtedly they acquired by transfer by the document under consideration. The respondent company were after the transfer, the owners of the debt which was the subject matter of the suit and the legal incidents thereof and consequently were the real owners of the decree. The respondent company derived their title to the debt by transfer from the transferors and claimed the same under the latter. When the respondent company became the owner of the decree immediately on its passing they must, in relation to the decree, be also regarded as persons claiming under the transferors. The respondent company would not have become the owner of the decree unless they were the owners of the debt and if they claimed the debt under the transferors they must also claim the relative decree under the transferors as accretions, as it were, to their original right as transferees of the debt. In my opinion, the respondent company are entitled under section 146 to make the application for execution which the original decree- holders could do.

42. The result, therefore, is that this appeal must be dismissed with costs."

(emphasis supplied)

Hon'ble Bhagwati, J also dismissed the appeal but for the reasons mentioned in his order which are as follows:-

"49. The question therefore that falls to be considered is whether the deed of assignment dated the 7th February 1949 operates as a transfer of the decree by assignment in writing within the meaning of O. 21, R. 16, C.P.C.

56. The debt which is the subject- matter of the claim is merged in the decree and the transferee of the actionable claim becomes entitled by virtue of the assignment in writing in his favour not only to the book debt but also to the decree

in which it has merged. The book debt does not lose its character of a debt by its being merged in the decree and the transferee is without anything more entitled to the benefit of the decree passed by the court of law in favour of the transferor. It would have been open to the transferee after the execution of the deed of assignment in his favour to take steps under O. 22, R. 10 of the Code of Civil Procedure to have himself substituted in the pending litigation as a plaintiff in place instead of the transferor and prosecute the claim to judgment; but even if he did not do so he is not deprived of the benefit of the decree ultimately passed by the court of law in favour of the transferor, the only disability attaching to his position being that under section 132 of the Act he would take the actionable claim subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer. The transferee of the actionable claim thus could step into the shoes of the transferor and claim to be the transferee of the decree by virtue of the assignment in writing executed by the transferor in his favour and could therefore claim to execute the decree as transferee under O. 21, R. 16, C.P.C. 59. I am therefore of the opinion that if the Respondents could not avail themselves of O. 21, R. 16 C.P.C. they could certainly under the circumstances of the present case take the execution proceedings and make the application for execution of the decree passed by the City Civil Court in favour of Habib and Sons under section 146 Civil P.C. 63. The appeal accordingly fails and is dismissed with costs."

(emphasis supplied)

9. Hon'ble Imam, J. also dismissed the appeal and observed:-

"64. I have had the advantage of perusing the judgments of my learned brethren. I agree that the appeal must be dismissed with costs and in the view expressed by them that the respondent should be permitted under the provisions of section 146 of the Code of Civil Procedure to execute the decree passed in favour of Habib and Sons, as one claiming under the latter.

65. The document under which the respondent claimed to execute the decree was treated as a deed of transfer in the courts below and not merely as an agreement to transfer. By this document there was a transfer of all the book and other debts

due to Habib and Sons in connection with the Indian business and the full benefit of all securities for the debts. The document, however, neither in terms, nor by any reasonable interpretation of its contents purported to transfer any decree which Habib and Sons may obtain in the future. It seems to me, therefore, that the respondent cannot claim to be a transferee of the decree, which was subsequently obtained by Habib and Sons, by an assignment in writing within the meaning of O. 21, R. 16, Civil P.C.

66. I agree with my learned brother Das, J. that the provisions of O. 21, R. 16 contemplate the actual transfer by an assignment in writing of a decree after it is passed and that while a transfer of or an agreement to transfer a decree that may be passed in future may, in equity, entitle the intending transferee to claim the beneficial interest in the decree after it is passed, such equitable transfer does not render the transferee a transferee of the decree by assignment in writing within the meaning of O. 21, R. 16. In this respect the decisions of the Madras High Court in *Basroovittil Bhandari v. Ramchandra Kamthi*, 17 Mad. LJ 391 and of the Calcutta High Court in *Mathurapore Zamindary Co. Ltd. v. Bhasaram Mandal(1)* and *Prabashinee Debi v. Rasiklal Banerji*, AIR 1924 Cal 661 (P) and AIR 1932 Cal 439 (T) are correct.

67. As at present advised, I would like to express no opinion as to whether the expression "by operation of law" can be given the interpretation suggested by my learned brother Das, J., as it is unnecessary to do so in the present appeal. Appeal dismissed."

(emphasis supplied)

10. It is, therefore, clear from a perusal of the aforesaid judgment that all the three Hon'ble Judges agreed that the appeal should be dismissed as the respondent-company could maintain the application for execution under Section 146 CPC though they could not claim any right of substitution under Order 21 Rule 16 of CPC.

This decision of the Supreme Court does not help the petitioners. In the first instance the Supreme Court held that the respondent-Company could file an

application under Section 146 of the Code of Civil Procedure for execution of the decree and secondly the deed of assignment in the case before the Supreme Court and in the present case is entirely different. What was assigned before the Supreme Court by the firm Habib and Sons to the assignee M/s. Raw Cotton Company during the pendency of the suit was all books and other debts due to them in connection with their business in Bombay and full benefits of all securities for the debts and all other property to which they were entitled to in connection with the said business. The Supreme Court after examining the aforesaid terms of the deed held that the application for execution under Order 21 Rule 16 CPC could be filed only after the decree was passed.

The deed of assignment executed by the State Bank of India in favour of Kotak Mahindra Bank in the present case is entirely different and the relevant Clauses of the assignment are reproduced below:-

"This Deed Of Assignment (this "Deed" or "these presents" or "this Agreement") executed at Ahmedabad on this 29th day of MARCH 2006 between :

KOTAK MAHINDRA BANK LIMITED, a banking company within the meaning of the Banking Regulation Act, 1949 and registered under the Companies Act, 1956 and having its registered office at 36-38A, Nariman Bhavan, 227, Nariman Point, Mumbai 400 021 (hereinafter called the "Assignee", which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns). AND State Bank of India, a Statutory Corporation incorporated under the provisions of the State Bank of India Act, 1955 having its office at Corporate Centre, 13th Floor, State Bank Bhavan, Madame Cama Road, Mumbai, (hereinafter call the "Assignor", which expression shall, unless it be repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns) of the One Part;

1.1 The Assignor hereby covenants that it owns the Debts and all the right, title and interest alongwith underlying assets and security conferred (a list of immovable properties mortgaged by the Client in favour of the Assignor or trustee or agent of the Assignor (as the case may be) either by way of first charge second charge or otherwise is described in Schedule B attached herewith) by the

Financial Instruments, free and clear of all liens, charges and other encumbrances, free from any right, title or interest of any other person in any manner.

1.2 In consideration of the Assignee having paid to the Assignor the consideration as mentioned in the Agreement to Assign on or before the execution of these presents the Assignor doth hereby irrevocably, unconditionally and absolutely assign, transfer and release without recourse unto the Assignee and the Assignee hereby acquires and takes over from the Assignor:

1.2.1 The Debts and all the Assignor's right, title, interest and benefit in and to the Debts and all the rights, title and interest of the Assignor under the Financial Instruments (if any), whether by way of first or second charge, if any, (in any form and in any manner whatsoever), or by way of hypothecation or mortgage, or by way of absolute or pari passu charge, absolutely and forever to the end and intent that the Assignee hereafter shall be the full and absolute legal and beneficial owner thereof and legally and beneficially entitled to demand, receive and recover the Debts in its own name and right.

1.2.2 all legal proceedings by the Assignor relating to the Debts and pending on the date hereof, shall stand assigned to the Assignee and shall continue as per the directions of the Assignee at the cost and risks of assignee and from the date hereof shall be enforceable by the Assignee. On such transfer, the Assignee shall stand subrogated in place of the Assignor in respect of the Debts.

1.2.3 It is clarified that the liabilities that may arise in future on account of action or omission of the Assignor (in relation to the Debts), prior to the date of this Agreement are not acquired by the Assignee.

2. RECEIPT OF DEBTS BY The ASSIGNOR

2.1 The Assignor hereby agrees that in the event the Assignor receives, subsequent to the date of the execution of this Deed, any amount/money towards payment of the Debts or any part thereof which is payable by the Client after the execution of this Deed, the Assignor shall forthwith handover such amount/money

to the Assignee.

2.2 The parties hereby agree and confirm that the Assignor is not a trustee for the Assignee and neither this Deed nor any action taken by the Assignor hereunder shall constitute as between the Assignor and the Assignee a partnership, association, joint venture or other common enterprise. The relationship between the Assignor and the Assignee hereunder is that of the parties to a privately negotiated arm's length sale of the Debts on a principal- to-principal basis.

2.3 Simultaneously with the execution of this Deed, the Assignor shall send a notice addressed by the Assignor to the Clients and other related persons informing them of the assignment of Debts and the Financial Instruments to the Assignee and instructing them to pay all amounts constituting the Debts to the Assignee and a copy of the said notice shall be delivered to the Assignee.

2.4 On and from the date hereof:

2.4.1 The Assignee shall have the sole and absolute right of collecting all amounts representing the Debts in such manner as the Assignee in its absolute discretion determines;

2.4.2 The Assignor shall not be subject to any duties and/or obligations in respect of the Financial Instruments;

2.4.3 The Assignee shall have all the rights under the Financial Instruments as if they were executed by the Clients in favour of the Assignee;

2.4.4 The Assignee shall have all the rights under the decree, if any, issued by any court/tribunal in favour of the Assignor, in respect of the Debts as if they were issued in favour of the Assignee.

2.4.5 The Assignee shall be entitled to the security available for due repayment of the debts."

(emphasis supplied)

11. It is, therefore, clear from the clauses of the aforesaid assignment deed referred to above that the assignee had acquired all the assignors, right, title, interest and benefit in the debts and the financial instruments and the assignee became the full and absolute legal and beneficial owner entitled to demand, receive and recover the Debts in its own name and right. It was also provided under the said assignment deed that all legal proceedings by the assignor relating to the debts and pending on the date, shall stand assigned to the assignee and shall be enforceable by the assignee. It was also provided that on such transfer, the assignee shall stand subrogated in place of the Assignor in respect of the debts. The deed further provided that the assignee shall have the sole and absolute right of collecting all amounts representing the debts and the assignee shall have all the rights under the decree issued by any Tribunal in favour of the assignor in respect of the debts as if they were issued in favour of the assignee.

The provisions of assignment deed referred to above leave no manner of doubt that Kotak Mahindra Bank could and was justified in moving the application for substitution of its name in the recovery certificate even after the Transfer Application was decided by the Debts Recovery Tribunal.

12. The issue can be examined from another aspect. The State Bank of India had given financial assistance to the petitioners. The Securitisation Act seeks to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Section 5(1) of the Securitisation Act deals with Acquisition of rights or interest in financial assets and is quoted below:-

"Section 5. Acquisition of rights or interest in financial assets.-

(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution-

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon

between them; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the securitisation company or the reconstruction company, such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of- attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company or reconstruction company, as the case may be.

(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced

by or against the securitisation company or reconstruction company, as the case may be."

(emphasis supplied)

Thus, under Section 5 of the Securitisation Act, any securitisation company or reconstruction company can acquire financial assets of any bank by issuing a debenture bond or any other security or by entering into an agreement with such bank for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them. Sub-section (4) of Section 5 further provides that if on the date of acquisition of financial asset any suit filed by the Bank relating to the said financial asset is pending, the same shall not abate by reason of acquisition of financial asset by the securitisation company and can be continued, prosecuted and enforced by the securitisation or reconstruction company. In the present case, the deed of assignment was executed between State Bank of India and Kotak Mahindra Bank and thus also, in view of the provisions of Section 5(4) of the Securitisation Act, the suit could be continued, prosecuted and enforced by the securitisation or reconstruction company even if the assignment deed was executed during the pendency of the Transfer Application before the Debts Recovery Tribunal.

In view of the aforesaid discussion, the decision of the Supreme Court in *Jugalkishore Saraf (supra)* will not come to the aid of the petitioners and the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal committed no illegality in allowing the application filed by Kotak Mahindra Bank.

13. Reliance placed by the learned Senior Counsel on the order dated 10th May, 2006 by which the Debts Recovery Tribunal rejected the application filed by the petitioners for dismissal of the Transfer Application as the State Bank of India had executed the assignment deed in favour of the Kotak Mahindra Bank and had no interest left cannot also be accepted. Kotak Mahindra Bank was not a party in the said application and had not been heard by the Debts Recovery Tribunal when it passed the said order and, therefore, cannot be bound by the said order. Even otherwise, the said order cannot preclude Kotak Mahindra Bank from filing an application for substitution of its name in the recovery certificate. There is,

therefore, no merit in this petition. It is, accordingly, dismissed.

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