

Krishan Kumar Pareek Vs. State Bank of India and 2 ors.

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Court : Orissa

Decided On : Dec-17-2008

Reported in : AIR2009Ori100; (2009)107CALLT362(NULL)

Judge : B.S. Chauhan, C.J. and; B.N. Mahapatra, JJ.

Appellant : Krishan Kumar Pareek

Respondent : State Bank of India and 2 ors.

Advocate for Pet/Ap. : Mr. Sanjeev Udgata, Mr. Udgata

Disposition : Petition dismissed

Judgement :

B.S. Chauhan, C.J.

1. This Writ Petition has been filed for quashing the impugned Order Dated 11.9.2008 (Annex.-2) by which proceedings have been initiated by the Debts Recovery Tribunal, Cuttack (hereinafter referred to as the 'Tribunal') for execution of a decree passed by the Civil Court by issuing the show cause and further challenging the Order Dated 20.11.2008 (Annex.-4) by which the objection submitted by the Petitioner that the original application filed by the Bank was not maintainable before the Tribunal on the ground that the decree had been passed by the Civil Court on 25.7.2006 for a sum of Rs. 7,96,660/- with P.I. and F.I. etc. subsequent to the amendment. Thus the application was barred by the provisions

of Section 31(A) of the Recovery of Debts due to Bank and Financial Institutions Act, 1993 (hereinafter referred to as the '1993 Act').

2. The facts and circumstances giving rise to this case are that the Opposite Party No. 1 State Bank of India filed an Original Application before the Tribunal on the factual matrix that the said bank after considering the application made by the present Petitioner/ Defendant sanctioned a loan of Rs. 5 lakhs in the form of cash credit on 15.1.1991. The Petitioner/Defendant had availed the loan after executing requisite loan documents. The other partners of the firm stood as guarantors in their personal capacity for the said loan and for that purpose the, documents relating to the property were deposited by creating equitable mortgage. The loan amount was disbursed in cash in the account of the Petitioner/Defendant. It was withdrawn. However, he did not make the repayment as per the agreement. The Petitioner Defendant sold away the stocks and did not deposit the sale proceeds into the account. Being aggrieved, legal notice was served on the Petitioner/Defendant on 22.11.1995. But the Petitioner did not consider it appropriate to make the payment of the outstanding due . Opposite Party bank filed Title Mortgage Suit, i.e., TMS No. 72 of 1996 for recovery of a sum of Rs. 7,96,660/- on. 21.7.1996 with P.I. and F.I. at the rate of 17% per annum in the Court of Learned CivW Judge (S.D.), Rourkela. In spite of service of summons, the Petitioner/Defendant did not enter appearance nor did he file any written statement and also did not contest the suit. Thus, the suit proceeded ex parte against the Petitioner/Defendant. The Learned Civil Judge finally decreed the suit against the Petitioner/Defendant vide Judgment and decree dated 9.2.2001 and final decree was passed on 25.7.2006. Though in spite of the decree the Petitioner Defendant failed and neglected to pay the decretal amount within stipulated time, the Opposite Party bank resorted to the procedure of execution of the decree. Such jurisdiction was changed from the Civil Court to the Tribunal under Section 31(A) of the 1993 Act. The outstanding decretal dues calculated with interest as on 15.7.2008 came to Rs. 49,55,622 inclusive of interest etc. The Petitioner/Defendant opposed the said execution proceedings on the ground that such execution proceedings were not maintainable in view of the fact that the decree had been passed by the Civil Court subsequent to commencement of the Amendment Act, i.e. insertion of Section 31(A) of the Act as the amount had been

less than ten lakhs. The said application has been rejected by the Tribunal vide impugned Order Dated 20.11.2008.

3. The Tribunal further held that in the instant case admittedly the final decree was passed by the Civil Court on 25.7.2006 for a sum of Rs. 7, 96,660/- with P.I. and F.I. at the rate of 17% per annum, the application was filed for issuance of recovery certificate for a sum of Rs. 49,55,622 inclusive of decretal amount and interest from the date of filing of TMS No. 72/1996 till the date of filing of the O.A. As the said amount was over and above Rs. 10 lakhs, the Civil Court had no jurisdiction to entertain the same and for recovery of the said amount the Tribunal has jurisdiction to issue a fresh certificate. Hence, this Writ Petition.

4. We have heard Mr. Sanjeev Udgata, Learned Counsel for the Petitioner and Mr. Tuna Sahu, Learned Counsel appearing for the bank at length and perused the record.

5. The Tribunal accepted the averment of the applicant bank that the suit claim was over and above Rs. 10 lakhs as per the final decree passed by the Civil Court i.e. inclusive of interest. The Learned Tribunal relied upon a Judgment of the Hon'ble Supreme Court in Punjab National Bank, Dasuya v. Chajju Ram and Ors. AIR 2000 SC 2671 wherein the Court held that where the decretal amount of the suit was above Rs. 10 lakhs inclusive of the interest from the date of filing of the suit till recovery and the execution proceedings were filed when the amount due under decree became more than Rs. 10 lakhs, the application was maintainable by the Tribunal only and not by the Civil Court on the ground that the decree was for less than Rs. 10 lakhs at the initial stage.

6. While deciding the case relating to Punjab National Bank, Dasuya (supra), the Apex Court placed reliance on its decision in Allahabad Bank v. Canara Bank AIR 2000 SC 1535 wherein the Court had held that the proceeding in Section 31 of the 1993 Act would include an execution proceeding pending before the Civil Court before commencement of the Act. It was further held that the suits and proceedings pending before the Civil Court would stand transferred to the Tribunal.

7. As the matter is squarely covered by the Judgment of the Hon'ble Supreme Court in Punjab National Bank, Dasuya (supra) and Mr. Udgata was not able to make any distinction, we are of the considered opinion that no interference is required in the facts and circumstances of the case.

8. Even otherwise if the argument of Mr. Udgata, Learned Counsel for the Petitioner is accepted, the facts of this case do not warrant any interference in equity jurisdiction as it is settled legal proposition that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. (Vide Dal Singh v. King Emperor of India AIR 1917 PC 25; Collector, Land Acquisition Anantnag v. Mst. Kastiji and Ors. : (1987)ILLJ500SC ; Mohammad Swalleh and Ors. v. Illrd Additional District Judge, Meerut and Anr. : [1988]1SCR840 ; and Sree Jain Swetambar Terapanthi Vid(s) v. Phundan Singh : [1999]1SCR498).

9. In Mohammad Swalleh and Ors. v. Illrd Additional District Judge, Meerut and Anr. : [1988]1SCR840 there was dispute between the landlord and the tenant and against the order of the prescribed authority an appeal was preferred before the District Judge, though under the provisions of U.P. (Temporary) Control of Rent and Eviction Act, 1947 such an appeal was not maintainable. The District Judge allowed the appeal and set aside the Judgment and order of the prescribed authority. The said appellate order was challenged before the High Court on the ground that the Judgment of the Appellate Court was nullity for want of jurisdiction. As the appeal was a creation of the statute and the Learned District Judge had no competence to entertain the appeal. The High Court refused to interfere with observing that the Court should not set aside the order/which revives a wrong order and in such circumstances the High Court could have passed the same order, which had been passed by the Appellate Court. Thus, no interference was required. The Apex Court dealing with the case held as under: It is true that there has been some technical breach because if there is no appeal maintainable before the Learned District Judge, in the appeal before the Learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High

Court itself could have set it aside. Therefore, in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken.

10. In the facts and circumstances of the case, a huge amount of outstanding dues is to be recovered. The suit was filed in 1996. No attempt had ever been made by the Petitioner to make any deposit or enter any kind of settlement between the parties. No explanation could be furnished by Mr. Udgata, Learned Counsel for the Petitioner as to how the suit had been decreed ex parte and why the Petitioner did not consider it appropriate to contest the suit. More so, no application for setting aside the ex parte Judgment and decree had ever been filed. In such a fact-situation, we fail to understand as how this Court is required to interfere when the Petitioner is adamant not to make any deposit whatsoever. Mr. Udgata did not accept our proposal/ suggestion that in case the Petitioner-Defendant is so aggrieved on the issue of jurisdiction of the Tribunal, Petitioner may deposit the outstanding dues in part to show his bona fides in the Registry of this Court. However, he had no hesitation to answer in the negative.

11. The writ is a discretionary relief and whatever may be the merit of the case, in the peculiar facts and circumstances the Court may refuse to exercise its jurisdiction.

12. Writ is not issued merely because if it is lawful to do so. Once a factual stand is taken, it cannot be changed on any legal proposition whatsoever nor it is permissible for the Court to examine the correctness of the findings of fact unless it is found to be perverse being based on no evidence or contrary to evidence, as the Writ Court exercises its supervisory jurisdiction and not of Appellate forum. The purpose of the Writ Court is not only to protect a person from being subjected for violation of law but also to advance justice and not to thwart it. The Constitution

does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being the power discretionary, the Court has to balance competing interest, keeping in mind that interest of justice and public interest can coalesce in certain circumstances. (Vide Champalal Binani v. Income Tax Commissioner, West Bengal : [1970]76ITR692(SC) ; Ramniklal N. Bhulta v. State of Maharashtra : AIR 1997 SC1236 ; Chimajirao K. Shrike v. Oriental Fire and General Insurance Co. Ltd. : AIR 2000 SC2532 ; Ganpatrao Shama Prashant Raje v. Ganpat Rao : AIR 2000 SC3094 ; LIC of India v. Asha Goyal : AIR 2001 SC549 ; Roshandeen v. Preeti Lal : (2002)ILLJ465SC ; S.D.S. Shipping Pvt. Ltd. v. Jay Container Services Co. Pvt. Ltd. and Ors., : AIR 2003 SC2186 ; Chandra Singh v. State of Rajasthan and Anr. : AIR 2003 SC2889 ; and K.D. Sharma v. Steel Authority of India and Ors. 2008 AIR SCW 6654).

13. In A.M. Allison v. B.L. Sen : (1957)ILLJ472SC , the Apex Court held that Writ Court can refuse to exercise its jurisdiction as the writ proceedings cannot 'of course', if it is satisfied that there has been no failure of justice.

14. Therefore, Court has to examine the case with this angle also bearing in mind that cause of substantial justice cannot be defeated on mere technicalities.

15. At this juncture Mr. Udgata submitted that this Court must issue a direction to the Opposite Party bank to settle the matter and in case the Petitioner submits proposal for One Time Settlement it should be accepted and decided and till then the execution proceedings before the Tribunal be stayed. We are afraid such a direction cannot be issued by this Court in view of the law laid down by the Hon'ble Apex Court in Oriental Bank of Commerce v. Sunder Lal Jain and Anr. : AIR 2008 SC1339 ; and M/s. D.S. Mechanical Works v. State Bank of India and Anr. AIR 2008 P & H 162. Therefore, the relief sought by the Learned Counsel for the Petitioner cannot be granted. The Apex court while deciding the case of Sunder Lal Jain (supra), referred to and relied upon its earlier judgment in Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh and Ors. : [1978]1SCR375 ; Lekhraj Satramdas Lalvani v. Deputy Custodian cum-Managing Officer : [1966]1SCR120 , Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College : (1962)ILLJ247SC ; and Dr. Umakant Saran v. State of Bihar

: (1972) IILLJ580SC , and observed as follows: There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of the officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.... In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on Respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same.

Thus, this Court has no competence to issue any direction to the Bank to consider and accept Petitioner's proposal for O.T.S.

16. In view of the above, we do not find any merit in this Writ Petition and the same is dismissed.

B.N. Mahapatra, J.

I agree.

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