

Continental Construction Ltd., Vs. State Bank of India, Overseas Branch (Service to Be Effected Through Its Manager) and ors.

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Court : Delhi

Decided On : Oct-30-2003

Reported in : AIR2004Delhi121; II(2004)BC348; [2005]125CompCas380(Delhi); 108(2003)DLT266; [2004]51SCL103(Delhi)

Judge : D.K. Jain and; Madan B. Lokur, JJ.

Acts : [Recovery of Debts due to Banks and Financial Institutions Act, 1993](#) - Sections 7(1), 7(2), 8, 17, 19, 20, 25 to 28, 29 and 30; ;Companies Act, 1954

Appeal No. : CW No. 1550 of 2003

Appellant : Continental Construction Ltd., ;mr. M.S. Basi and Mr. Vijay Kumar Verma

Respondent : State Bank of India, Overseas Branch (Service to Be Effected Through Its Manager) and ors.

Advocate for Def. : S.L. Gupta, Adv. for Respondent No. 1, ; Vinay Sharma, Adv. for Respondents Nos. 2 and 3

Advocate for Pet/Ap. : A.S. Chandhiok, Sr. Adv.,; Divjot Singh,; Jyoti Mendiratta

Disposition : Writ petition dismissed

Judgement :

Madan B. Lokur, J.

1. The Petitioners have prayed for setting aside orders dated 13th and 16th January, 2003 passed by the Recovery Officer of the Debts Recovery Tribunal - II, Delhi in RC No. 97/2001 and RC No. 245/2001.

2. Two appeals, being Miscellaneous Appeal Nos. 1/2003 and 2/2003 were filed against the aforementioned orders, of which Miscellaneous Appeal No. 2/2003 was filed by the Petitioners. These appeals were decided by the Presiding Officer of the Debts Recovery Tribunal - II (for short the Tribunal) on 21st February 2003. The Petitioners have challenged the correctness of the order dated 21st February 2003 also.

3. Since the orders passed by the Recovery Officer were the subject matter of appeals decided by the Presiding Officer of the Tribunal on 21st February 2003, essentially, the challenge of the Petitioners is to the correctness of the appellate order dated 21st February 2003, the two orders dated 13th and 16th January 2003 passed by the Recovery Officer having merged with the appellate order. We may mention, en passant, that the Petitioners had earlier challenged the correctness of the order dated 16th January 2003 by filing CW No. 526 of 2003. That writ petition was disposed of on 21st January 2003, inter alia, on the statement of learned counsel for the Petitioners that his clients would appeal against the order dated 16th January 2003 to the Tribunal. Consequently, there can be no dispute that what is really in question before us is the correctness of the order dated 21st February 2003 passed by the Tribunal.

4. Petitioner No.1 is a company. Petitioners No.2 and 3 and Respondents No.2 and 3 are shareholders of Petitioner No.1. There seem to be some inter se disputes between these shareholders of Petitioner No.1 but we are not concerned with their disputes. Suffice it to say that for the purposes of the present writ petition, it is assumed that Petitioners No.2 and 3 have the authority to file this writ petition on behalf of Petitioner No.1, although this is disputed by learned counsel for Respondents No.2 and 3.

5. Respondent No.1 is a nationalized bank and it had apparently financed some construction projects to be undertaken by Petitioner No.1 in Iraq. However, due to the developments in Iraq, Petitioner No.1 was unable to repay its debts to Respondent No.1.

6. Consequently, Respondent No.1 filed claims before the Debts Recovery Tribunal under Section 19 of the [Recovery of Debts due to Banks and Financial Institutions Act, 1993](#) (hereinafter referred to as the Act). The claims were registered as O.A. No.37/1998 (decided on 27th May, 1999) and O.A. No.38/1998 (decided on 26th May, 1999). Respondent No.1 was held entitled to a recovery of about Rs.90 crores from Petitioner No.1. This amount has now swollen up to over Rs. 160 crores, including interest.

7. Pursuant to orders passed by the Tribunal, recovery certificates were issued against Petitioner No.1 being RC No. 97/2001 and RC No.245/2001.

8. As mentioned above, the Petitioners filed Miscellaneous Appeal No.2/2003 against the orders of the Recovery Officer dated 13th January, 2003 and 16th January, 2003. While disposing of this appeal (and the connected appeal) by the impugned order dated 21st February, 2003, the Tribunal observed that the matter in issue related to the powers of the Recovery Officer to appoint a Receiver and attach the assets of Petitioner No.1 held either in its own name or in a joint venture with its sister concern being M/s Continental Foundation.

9. When the writ petition was listed before us on 16th May 2003, learned counsel for the Petitioners stated that for the purpose of the present writ petition, Respondents No.4 to 8 are not necessary parties and notice to them may be dispensed with for the time being. It is for this reason that Respondents No. 4 to 8 are unrepresented.

10. When we heard learned counsel for the parties on 21st July 2003, two questions were framed for decision. The two questions were: -

'(1) Whether the Recovery Officer appointed under the [Recovery of Debts due to Banks and Financial Institutions Act, 1993](#) has the power to appoint receiver of a

company incorporated under the Companies Act, 1954?

(2) Whether on the facts of the present case, the appointment of the receiver was justified?'

11. However, when we finally heard the writ petition on 6th and 28th August, 2nd to 5th, 15th, 17th, 18th and 23rd September 2003 it appeared that the preliminary objection raised by Respondent No.1 merited serious consideration, the preliminary objection being that the Petitioners have an alternative remedy by way of an appeal against the order dated 21st February 2003 to the Debts Recovery Appellate Tribunal (for short the Appellate Tribunal) constituted under the provisions of Section 8 of the Act. This being the position, in brief, we then heard learned counsel for the parties on the preliminary objection raised by learned counsel for Respondent No.1.

12. Recovery Officer is defined in the Act in Section 2(k) as an officer appointed by the Central Government under Section 7(1) for each Debts Recovery Tribunal. On a reading of Section 7(1) of the Act, it is quite clear that a Recovery Officer is a member of the staff of the Debts Recovery Tribunal (including the Tribunal in the present case). In terms of Section 7(2), the Recovery Officer shall discharge his functions under the general superintendence of the Presiding Officer of the Tribunal.

13. The jurisdiction, power and authority of the Tribunal is laid down in Section 17 of the Act to 'entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.' While deciding such an application (filed under Section 19 of the Act) the Tribunal may issue a certificate under the signature of the Presiding Officer of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate [Section 19(22)]. Sections 25 to 28 of the Act relate to the recovery of debts determined by the Tribunal, and consequently, the power of the Recovery Officer. Section 30 relates to an appeal against an order of the Recovery Officer and reads as under: -

'30. Appeal against the order of Recovery Officer. - (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive).'

14. It is under Section 30 of the Act that the Petitioners challenged by way of an appeal before the Tribunal, the correctness of the orders dated 13th and 16th January 2003 passed by the Recovery Officer. The order passed by the Tribunal in appeal is dated 21st February 2003 and is impugned before us.

15. The preliminary objection of learned counsel for Respondent No.1 is that the order dated 21st February 2003 can be appealed against by the Petitioners to the Appellate Tribunal under the provisions of Section 20 of the Act, which reads as under: -

'20. Appeal to the Appellate Tribunal. - (1) Save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) to (5) xxx xxx xxx

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.'

16. Having heard learned counsel for the contesting parties, we are of the view that the writ petition filed by the Petitioners ought not to be entertained and that the Petitioners ought to be relegated to the alternative remedy of filing an appeal under the provisions of Section 20 of the Act before the Appellate Tribunal against

the order dated 21st February 2003 passed by the Tribunal. Learned counsel for the Petitioners contended that there is no remedy of an appeal available to his clients.

17. Learned counsel for the Petitioners submitted that if the statute does not provide for the filing of an appeal, no Court could create such a right in a litigant. Reliance in support of this proposition was placed on *State of Haryana vs . Maruti Udyog Ltd. & others*, : 2000(71)ECC684 and *A. R. Antulay vs . R. S. Nayak & another*, : 1988 CriLJ1661 . Quite naturally, the proposition is unexceptionable. Elaborating further, learned counsel submitted that Section 30 of the Act, as it now is (and quoted above) was incorporated in the statute by an amendment to the Act in 2000. Prior to its amendment in 2000, Section 30 read as under: -

'30. Orders of Recovery Officer to be deemed as orders of Tribunal.

Notwithstanding anything contained in section 29, an order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive), shall be deemed to have been made by the Tribunal and an appeal against such order shall lie to the Appellate Tribunal.'

18. The contention of learned counsel for the Petitioners was that the omission of the words 'and an appeal against such order shall lie to the Appellate Tribunal' was deliberate and suggested that Parliament did not intend a remedy of an appeal to the Appellate Tribunal being provided for.

19. It has long been accepted since *The Attorney General v. Sillem* (1864) 10 HLC 704 that

'The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the court of the first instance, and to the court of error or appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the

creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another.'

Indeed, in *Maruti Udyog* the Supreme Court has explicitly stated (in paragraph 7 of the Report) that

'... right of appeal is the creature (sic creation?) of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the error of the court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law.'

20. A plain reading of Sections 30 and 20 of the Act makes it clear that an appeal against an order of the Recovery Officer is maintainable before the Tribunal (in accordance with the provisions of Section 30 of the Act) and an appeal is maintainable before the Appellate Tribunal against an order of the Tribunal (in accordance with Section 20 of the Act). It is well known [see *Sussex Peerage case* (1844) 11 Cl & Fin 85: 8 ER 1034 that

'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.'

This was cited (without disagreement) by the Constitution Bench in *Punjab Land Development & Reclamation Corporation Ltd. vs. Presiding Officer, Labour Court*, : (1990) IILLJ70SC . thereforee, on a consideration of the law placed before us, we have no doubt that a second appeal is maintainable against the orders of the Recovery Officer dated 13th and 16th January 2003.

21. The omission of the words 'and an appeal against such order shall lie to the Appellate Tribunal' in Section 30 of the Act (as it now stands) is a necessary concomitant of the overall amendment made in 2000 to Section 30 of the Act which actually works to the advantage of a litigant in as much as it provides for an additional appellate forum. This was noticed by the Supreme Court in *Union of*

India & another vs. Delhi High Court Bar Association & others, : [2002]2SCR450 . Prior to the amendment of the Act in 2000, only one appeal was provided for against an order of the Recovery Officer, and that appeal lay to the Appellate Tribunal; whereas since 2000, a first appeal is provided to the Tribunal and an appeal against the order of the Tribunal is provided to the Appellate Tribunal. This is a 'sufficient safeguard' as observed by the Supreme Court in Delhi High Court Bar Association in the event of the Recovery Officer acting in an arbitrary or unreasonable manner.

22. Learned counsel for the Petitioners then submitted, relying upon Sant Prasad v. Bhawani Prasad & another (1921) I.L.R., 43 All. 403 that since the Act did not provide for a second appeal against an order passed by the Tribunal (in the exercise of its original jurisdiction), no second appeal can be filed against an order passed by the Recovery Officer. While the general principle of law canvassed by learned counsel for the Petitioners may be true, this question does not at all arise in this writ petition for the simple reason that the Act itself provides for a second appeal against an order of the Recovery Officer. A specific right having been conferred by a statute cannot, surely, be taken away by resort to a general principle. For a similar reason, other cases relied on by learned counsel, such as Hari Kishen v. Amar Nath (1950) 52 P.L.R. 13 and Ali Ahmed vs. Roshan Das (1972) 8 DLT 429 are equally inapposite.

23. It was finally contended by learned counsel for the Petitioners that even though an alternative remedy may be available, the provisions of Article 226 of the Constitution can, nevertheless, be invoked in appropriate cases. There is no doubt about this. It has been reiterated by the Supreme Court, fairly recently in Harbanslal Sahnia & another v. Indian Oil Corporation Ltd. & others, : AIR 2003 SC2120 of the Report that

'...the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three fundamental contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of

principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged.'

24. In Punjab National Bank v. O.C. Krishanan & others, : AIR 2001 SC3208 , the Supreme Court dealt with the provisions of the Act, particularly Section 20 thereof. In paragraph 5 of the Report, the Supreme Court said: -

'In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act.'

The Supreme Court further dealt with this issue and explained in paragraph 6 of the Report as under: -

'The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot 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 demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions.'

25. The jurisprudence of prudence, therefore, requires that we do not interfere with the order passed by the Tribunal and leave it to the Petitioners to invoke the alternative remedy available to them. No violation of any fundamental right of the Petitioners has been pointed out to us; nor is there any serious allegation of a violation of any principle of natural justice; nor is it anybody's case that the Tribunal had no jurisdiction over the subject matter in issue before it.

26. Under the circumstances, we decline to interfere in exercise of our jurisdiction under Articles 226 and 227 of the Constitution. Liberty is, however, granted to the Petitioners to file an appeal to the Appellate Tribunal against the order dated 21st February 2003 passed by the Tribunal. We direct, in the interests of justice, that the question of limitation will not come in the way of the Appellate Tribunal entertaining the appeal if it is filed by the Petitioners within 15 days from today. If the appeal is filed within 15 days from today, the interim order passed by this Court on 26th February, 2003 will continue till the Appellate Tribunal takes up the appeal for hearing. A copy of this order may be issued dusty to the Petitioners to enable them to take appropriate action in accordance with law.

27. The writ petition is dismissed. Respondent No.1 will be entitled to costs of Rs. 20,000/- payable by the Petitioners before the Appellate Tribunal entertains the appeal.

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