

ORISSA HIGH COURT: CUTTACK

W.P.(C) No.9243 of 2006

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Ch. Ranganath Raju

...

Petitioner

-Versus-

Bank of India and others

...

Opp. Parties.

For Petitioner : M/s.S.S. Rao, B.K.Mohanty,
N.C. Nayak.

For Opp. Party no.1 : Mr.R.C. Das.

P R E S E N T:

**THE HONOURABLE MR. JUSTICE A.K.GANGULY
AND
THE HONOURABLE MR. JUSTICE I.MAHANTY**

Date of Hearing: 06.09.2006

Date of Judgment : 13.11.2006

A.K.Ganguly,J This writ petition has been filed by one Ch. Ranganath Raju challenging an order dated 21st June, 2006 passed by the Debts Recovery Tribunal, Cuttack (hereinafter called "DRT, Cuttack"). By the said order the DRT, Cuttack rejected the application filed by the writ petitioner for sending

his petition filed under Order 9, Rule 13 read with Section 151 of the Civil Procedure Code (for short "Code") in TMS No.19 of 1992 back to the learned Civil Judge (Senior Division), Chhatrapur.

2. The material facts of the case are that for realization of its claim the Bank filed against the borrowers and the guarantors, a suit being TMS No.19 of 1992 in the court of learned Civil Judge (Senior Division), Chhatrapur. The present petitioner, one of the guarantors, was defendant no.5 in the suit.

3. The suit was contested by the borrowers. Even though the guarantors filed a written statement, but they did not contest the suit. A decree on contest was passed in the said suit on 30.10.1996 against the borrowers and ex parte against the guarantors who were defendant nos.5, 6 and 7 in the suit.

4. All the three guarantors including present writ petitioner (defendant no.5) filed an application being MJC No. 77 of 1996 under Order 9, Rule 13 of the Code praying for setting aside the ex parte decree. In the meantime, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "RDB Act") came into force with effect from 25th June, 1993. The decree passed by the Civil Court on 30.10.1996 was not executed and as such an application under Section 31A of RDB Act

was filed by the Bank before the DRT, Patna which was registered as OA-60/99. After the DRT, Cuttack was established, the same was transferred to DRT, Cuttack and the application was numbered as OA-163/2001. It may be noted that the application under Order 9, Rule 13 of the Code filed by the writ petitioner and the other two guarantors being MJC No.77 of 1996 was also transferred by the Civil Court to DRT, Patna and consequently the same was transferred to DRT, Cuttack.

5. At this juncture, a petition being Miscellaneous Application No.288 of 2006 by defendant nos.5 to 7 was filed before DRT, Cuttack with a prayer for sending back the records of the case along with MJC No. 77 of 1996 before the Civil Judge (Senior Division), Chhatrapur for disposal in accordance with the provision of Order 9, Rule 13 read with Section 151 of the Code. The Tribunal rejected the said application by the impugned order.

6. Now, the question is: Whether the Tribunal was right in rejecting M.A. No. 288 of 2006 and whether it can decide the application for setting aside the ex parte decree passed by the Civil Court ?

7. Learned counsel for the petitioner submitted that in view of the provision of Section 9 of the Code, Civil Court has the jurisdiction to deal with all matters of civil nature and therefore, the application under Order 9,

Rule 13 of the Code should be dealt with by the Civil Court inasmuch as Order 9, Rule 13 of the Code provides that in any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside. Learned counsel also submitted that under Section 22(2)(g) of the RDB Act, DRT is empowered to set aside any order of dismissal of any application for default or any order passed ex parte by it. Since, in the instant case, the ex parte decree in the suit was not passed by the Tribunal, it could not take up the application for setting aside the same. Learned counsel also submitted that there is no ouster of jurisdiction of the Civil Court by the RDB Act in the matter of hearing of an application for setting aside an ex parte decree passed by a Civil Court. As such, the decision of the DRT is erroneous, and it cannot hear the setting aside application. In support of such contention, learned counsel for the petitioner relied on various judgments which would be considered later.

8. Learned counsel for the Bank, on the other hand, submitted that the provisions of RDB Act came into force on 25th June, 1993 and Section 17 of the said Act confers jurisdiction on and from the appointed day and Section 18 simultaneously creates a bar on and from the appointed day to the extent that no court or other authority shall have, or

be entitled to exercise, any jurisdiction, powers or authority in relation to the matters specified in section 17 except the Hon'ble Supreme Court and, High Court while exercising jurisdiction under articles 226 and 227 of the Constitution. Learned counsel further submitted that Section 19 read with Section 31 of the RDB Act makes it clear that all applications, pending before any court, immediately after establishment of the Tribunal, and coming within the jurisdiction of the Tribunal should be transferred to the DRT. He further submitted that in view of this clear legal position, the impugned order passed by the DRT is valid and may be upheld by this Court.

9. This Court is inclined to hold that DRT has the jurisdiction to hear the application for setting aside the ex parte decree passed by the Civil Court.

10. The reasons for this finding are discussed hereafter. The decision of the Supreme Court on which the petitioner relied on was rendered in the case of **Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar** reported in **AIR 1965 SC 338**. There a question was raised under Section 9 of the Code. Dealing with Section 9 of the Code, the learned Judges of the Apex Court held when the Civil Court had no jurisdiction over the suit, the High Court could not have dealt with the

cross objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. Continuing on the same view, the Apex Court held “when the Court had no jurisdiction over the subject matter of the suit, it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint” (See Para 13, Page 342 of the Report).

11. This Court is unable to appreciate how this ratio helps the present petitioner. Before coming to the aforesaid conclusion, the learned Judges have set out the provision of Section 189(1) of Madras Estates Land Act (I of 1908) whereby the jurisdiction of the Civil Court was barred. Similarly, in this case the jurisdiction of the Civil Court is barred in view of the provision of Section 17 as also Section 18 of the RDB Act. Section 31 of the said Act provides for transfer of all cases including a suit or a proceeding. In RDB Act, the legislature has ousted the jurisdiction of the Civil Court in connection with any civil suit or proceeding in much stronger terms that it did under the provision of Section 189(1) of Madras Estate Land Act, 1908. So the ratio in *Athmanathaswami Devasthanam* (supra) runs contrary to the contention of the petitioner.

12. The next decision cited by the petitioner was rendered in the case of **Ram Swarup v. Shikar Chand** reported in **AIR 1966 SC 893**. In that case, the question which came up for consideration was whether the jurisdiction of the Civil Courts can be excluded by special Acts which deal with special subject matters. In deciding that issue, the Supreme Court held that such exclusion must be provided expressly, or must be clear from necessary inference. The learned Judges held that normally two questions are relevant in such considerations, the first being, whether for exclusion of such jurisdiction clear and unambiguous words indicating that intention have been used and whether after exclusion the statute has provided for an adequate and satisfactory alternative remedy to an aggrieved party. Applying those two tests, the Apex Court held that the jurisdiction of the civil courts was excluded in relation to the matters, which are covered within the provisions of Section 3(4) and Section 16 of U.P. (Temporary) Control of Rent and Eviction Act (3 of 1947). In the instant case, the RDB Act has made express exclusion of jurisdiction of the Civil Courts in clear terms under Sections 17, 18, 19 and 31 of its provisions. After such exclusion, the forum of DRT has been provided along with a right of appeal. So this decision in *Ram Swarup* (supra) does not help the petitioner.

13. The other decision which was cited by the learned counsel for the petitioner was rendered by a Full Bench of the Orissa High Court in the case of **Duruju Mallik alias Duryodhan Swain v. Krupasindhu Swain** reported in **1984(I) OLR 887**. It was a decision in a proceeding under the Orissa Consolidation of Holdings & Prevention of Fragmentation of Land Act, 1972. The principles laid down in the case of **Ram Swarup (supra)** were reproduced and followed. It has also been stated that statutes affecting jurisdiction of Courts are to be construed, as far as possible, to avoid the effect of transferring the determination of rights and liabilities from ordinary Courts to other authorities. There can be no dispute with the aforesaid principles but in the instant case, the transfer of pending proceeding has been expressly stated in Section 31 of the Act. In the face of such clear statutory mandate for transfer of the proceeding to DRT, it is difficult to hold that the Civil Court will have the jurisdiction to hear the setting aside application.

14. The learned counsel for the petitioner also relied on the judgment of the Supreme Court in the case of **Shri Panch Nagar Parakh, Mandsaur v. Purushottam Das** reported in **AIR 1999 SC 3071** and on paragraph-10 of the said judgment. In that case, Qanoon Ryotwari Gwalior State Act came up for consideration and the Court held that even

though there is no express provision barring Civil Courts' jurisdiction, but the Court pointed out that the Act was a special statute dealing with the rights of various classes of tenants on the basis of a special procedure. The Apex Court, in the background of the special provision of the Act, held that High Court's finding that civil suit for redemption was maintainable and limitation of 30 years under Article 61 of the Limitation Act would apply, was made without considering the provision of the Special Act where the period of limitation is three years. So this decision does not support the petitioner's contention. In this case there is an express bar.

15. Similarly, the decision of the learned Single Judge in the case of **Sitaram alias Mahendra Ghosh v. Sri Antaryami Mohapatra and others** reported in **2003(II) OLR 409** also is not applicable to the facts of the present case. That decision construed the provision of Section 115 of the Code on the question of revision. This Court is unable to appreciate the relevance of the said decision to the facts of the present case.

16. This Court finds that the provisions of RDB Act were considered by the Supreme Court in the case of **Union of India and another v. Delhi High Court Bar Association and others** reported in **AIR 2002 SC 1479**. In paragraph-24 of the said judgment, the Supreme Court held that no one has an absolute right to demand that his dispute is

to be adjudicated upon only by a Civil Court and the Supreme Court further held that the forum of Civil Court stands replaced by a Banking Tribunal in respect of the debts due to the bank.

17. Pronouncing on the effect of Section 31 of RDB Act, the Apex Court in *Delhi High Court Bar Association (supra)* stated that once a DRT is established and the jurisdiction of the Court is barred by Section 18 of the Act, "it would be only logical that any matter pending in the Civil Court should stand transferred to the Tribunal". The learned Judges held that this happened when the Central Administrative Tribunal was established. Therefore, the jurisdiction which is vested on the Banking Tribunal under RDB Act is exclusive and only in that forum the bank cases can be tried and the learned Judges observed why provision of Section 31 has been enacted. In view of this clear pronouncement of the Supreme Court on Section 18 read with Section 31 of the Act, it is difficult for this Court to accept the contention of the learned counsel for the petitioner that the DRT has no jurisdiction to hear and decide the petition filed by the petitioner for setting aside the ex parte decree passed by the Civil Court.

18. The Full Bench of the Kerala High Court in the case of **C.J. Glenny v. The Catholic Syrian Bank Ltd** reported in **AIR 2003 Kerala 373** virtually came to conclusion which directly contradicts the contention

of the petitioner. The precise question which fell for consideration before the Full Bench of the Kerala High Court was whether under the provisions of RDB Act, the Civil Court has jurisdiction to decide the application for setting aside the ex parte decree passed by it. After discussing the facts of the case, the Full Bench came to the conclusion that the Civil Court has no jurisdiction to deal with the matter in case the amount is in excess of Rs.10 lakhs. The Full Bench held, it was imperative on the part of the Civil Court to transfer the application for setting aside to the Tribunal. This Court is in respectful agreement with the same view.

19. Reliance in this connection may be placed on the decision of the Delhi High Court in the case of **Risk Capital & Technology Finance Corporation Ltd. v. Harnath Singh Bapna** reported in **AIR 1997 Delhi 239**. In that case, the learned Judge held that the terms "other proceeding" in Section 31 of the Act would include an application for setting aside ex parte decree and such an application would get transferred to the Tribunal in view of the provisions of Section 31 of the RDB Act.

20. Similar is the view of Madras High Court in the case of **M. Vasanthalakshi and another v. Indian Bank and others** reported in **(2001)106 Company Cases 360**. The learned Judge held that in view of the provision of Section 31 of the RDB Act, on and after the formation of

DRT, the suit filed by the bank and other proceedings instituted by the petitioners, wherein the claim was more than Rs.10 lakhs, automatically gets transferred by operation of law. The facts of that case are somewhat similar to the present case. In that case the Bank approached the Tribunal for the recovery certificate and the Court held that the only remedy available to the petitioner was to move the Tribunal for setting aside the ex parte decree and the application filed before the Civil Court is not maintainable.

21. The judicial opinion in all the cases considered hereinabove is clearly against the contentions advanced by the petitioner. It is clear that after formation of the DRT every suit and other proceedings pending before any Civil Court in which the claim is in excess of Rs.10 lakhs shall stand transferred and would be heard and decided by the DRT.

22. The learned counsel for the petitioner repeatedly submitted that in view of Section 22(2)(g) of the RDB Act the Tribunal can only set aside "any order of dismissal of any application for default or any order passed by it ex parte". Learned counsel further submits that in view of this provision the Tribunal's power for setting aside order is confined only to those orders, which have been passed by it. Since in the instant case the

ex parte decree in the civil suit was not passed by the Tribunal it cannot set aside the same.

23. This Court is of the opinion that the said argument is without any basis. If the scheme of the RDB Act is analyzed, it would be apparent that original jurisdiction of the DRT is conferred under Section 17 read with Section 18. A conjoint reading of Sections 17 and 18 makes it clear that, on and from the appointed day, DRT shall, subject to Section 1(4), in respect of all applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions, exercise jurisdiction. It also follows that on and from the appointed day no Court or other authority shall exercise such jurisdiction, except of course, the Hon'ble Supreme Court and High Court, under Articles 226 and 227 of the Constitution. Section 19 of RDB Act deals specifically with the procedure of the Tribunal and Section 22 of that Act deals with the procedure of both the Tribunal and the appellate Tribunal. So Sections 17 and 18 read with Sections 19 and 22 of the RDB Act deal with the original jurisdiction of the Tribunal or the Appellate Tribunal, as the case may be, and which is vested on it on and from the appointed day in respect of the applications, which are to be filed by the banks and financial institutions for recovery of debts due to such banks and financial institutions. But in respect of every

other suit or proceeding before any court pending before the establishment of the Tribunal (hereinafter called "pending case") are dealt with under Section 31. It should be noted that while conferring jurisdiction on the Tribunal over pending cases under Section 31 of RDB Act, Parliament has used the expression "suit or other proceeding pending before any Court" but while conferring original jurisdiction on the Tribunal after its establishment, the expressions which have been used are "applications from the banks and financial institutions".

24. This difference in phraseology is of considerable importance. This difference means that after the appointed day and after the establishment of the Tribunal, proceeding by banks/ financial institutions for recovery of their debts cannot be termed, as suits, but it will be called an application, which has been defined under section 2(b) of RDB Act as "an application made to a Tribunal under Section 19". Thus, Section 22 of the RDB Act only refers to those applications under Section 2(b) of RDB Act and it does not refer to any pending case. The entire gamut of procedure referred to Section 22 would therefore apply to the applications, which were filed before the Tribunal after the appointed day and after it was set up. So far as the jurisdiction of the Tribunal over pending cases by transfer is concerned, the Tribunal may, on receipt of such records,

proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application under Section 19 from the stage which was reached before such transfer or from an earlier stage as the Tribunal may deem fit. This has been made clear in Section 31(2)(b) of the RDB Act. The exercise of jurisdiction by the DRT in pending cases and which have come to it on transfer is not controlled by Section 22 but by Section 19. That is why under Section 19, the Tribunal has been conferred with the authority to "make such orders and give such directions as may be necessary or expedient to give effect to its order or to prevent abuse of its process or to secure the ends of justice". Thus a very wide jurisdiction has been given to the DRT to deal with pending cases which have come to it on transfer. There are very good reasons for conferring such wide powers on the DRT which has to deal with pending cases on transfer. A case which was filed and pending before the Civil Court may, over the years, have developed unforeseen facets and may be covered with a thicket of controversy which is unknown to the structure of an application filed before DRT after its establishment. To deal with such contingency, the DRT has been designedly empowered with such broad jurisdiction as has been mandated under Section 19(25) and Section 31(2)(b) of the RDB Act.

25. The avowed purpose RDB Act is to ensure expeditious adjudication for speedy recovery of debts due to banks and financial institutions. This enactment was aimed at boosting financial reforms and was therefore to achieve a major public purpose.

26. Such purpose is obviously to minimize and overcome the well known procedural wrangles of a civil proceeding pending before a Civil Court. That is why Apex Court gave Section 31 of RDB Act a purposive interpretation in the case of **United Bank of India v. Abhijit Tea Co.** reported in **2000(6) SC 183** (See Para 22 and 28 of the report).

27. For the reasons discussed above and in view of the decisions considered by this Court, it is clear that the Tribunal has the jurisdiction under Sections 19 and 31 of RDB Act to deal with the application for setting aside the decree filed in a pending proceeding and which has been transferred to it under Section 31 of RDB Act. In dealing with such a proceeding the Tribunal is not bound by the limitation of Section 22(2)(g) of RDB Act. As such, there is no reason for this Court to interfere with the impugned order of the DRT.

The Writ petition is, therefore, dismissed. All interim orders are vacated. The Tribunal is directed to deal with the application for setting aside the ex parte decree filed by the petitioner as early as possible,

preferably within a period of three weeks from the date of service of this order on the Tribunal. There will be no order as to costs.

Sd/- A.K. Ganguly, J.

I. MAHANTY, J. : I agree.

Sd/- I. Mahanty, J.

Orissa High Court, Cuttack
Dated 13.11. 2006/Pradeep.

True Copy

Sr. Steno