HIGH COURT OF ORISSA: CUTTACK

FAO NO. 179 OF 2004

From the order dated 25.3.2004 passed by Sri N.K. Samal, learned Civil Judge (Senior Division), Titilagarh in M.J.C. No. 4 of 2001.

M/s. The Utkal Oil & Chemicals Industries,
Jagatpurand another ..... Appellants

-Versus-

The Syndicate Bank, Choudhury Bazar ..... Respondent

For Appellants : M/s. B.K. Mohanty,
U.K. Samal, B.R. Barik,
N.P. Ray & B. Patnaik.

For Respondent : M/s. B.N. Udgata &
S. Mohanty.

Date of Judgment: 29.04.2016

P R E S E N T:

THE HONOURABLE SHRI JUSTICE K.R. MOHAPATRA

K.R. Mohapatra, J. Order dated 25.3.2004 passed by the learned Civil Judge (Senior Division), Titilagarh in MJC No. 4 of 2001 rejecting an application under Order 9 Rule 13 read with Section 151 of the C.P.C. is under challenge in this appeal.

2. The factual matrix which gives rise to this appeal is that T.S. No. 29 of 1988 was filed by the respondent-Bank in the court of learned Civil Judge (Senior Division), Titilagarh for realization of Rs.6,37,393.75 together with *pendente lite* and future interest. The suit was decreed ex parte on 5.01.1995 and the defendants-

appellants were directed to pay a sum of Rs.6,37,393.75 together with *pendente lite* and future interest at the contractual rate with cost. By Letter No. 338/20/9597/REC/AG/2001 dated 22.02.2001, the Asst. General Manager, Zonal Office of the respondent-Bank intimated the defendant-appellant no. 2 about the ex parte judgment and decree passed in T.S. No. 29 of 1988. Thereafter, a petition under Order 9 Rule 13 read with Section 151 of the C.P.C. (MJC No. 4 of 2001) was filed by the defendants-appellants stating, inter alia, that the defendant-appellant no. 2 was the proprietor of M/s. The Utkal Oil and Chemical Industries, Jagatpur, Cuttack (appellant no. 1). Due to the alleged non-payment of loan dues, T.M.S. No. 376 of 1978 was filed by the respondent in the court of learned Civil Judge (Senior Division), Cuttack for realization of the loan dues along with other reliefs. The said suit was dismissed for default on different occasions. Lastly, after restoration of the suit on 3.4.1984, the respondent filed a petition for return of the plaint, which was allowed by order dated 16.3.1988. Thereafter, T.S. No. 29 of 1988 was filed in the court of learned Civil Judge (Senior Division), Titilagarh for the aforesaid relief. The summons issued to the defendants (appellants herein) returned un-served with a report of the Process Server that the defendant-appellant no. 1 was not in existence and defendant-appellant no. 2 was not residing in the given address. Thus, learned Civil Judge directed to take out notice with correct address. The respondent without complying with the same prayed for taking out

substituted notice under Order 5 Rule 20 C.P.C. which was mechanically allowed by order dated 3.9.1994. Consequently, there was publication of notice in Odia daily News Paper, "Dharitri" dated 27.9.1994. Considering the same, the defendant-appellants were set ex parte on 16.11.1994. It would be relevant to mention here that the suit against defendant no. 3, who was the sole guarantor, had already been abated due to non-substitution. Subsequently, ex parte judgment was passed on 23.12.1994 against the defendants-appellants and they were directed to pay a sum of Rs.6,37,393.75 with cost together with *pendente lite* and future interest at the contractual rate. As no notice was ever served on the defendants-appellants, they could not know about the ex parte judgment and decree. The appellant no. 1-Industry had been closed down since last 20 years and three years before the Industry was closed, the appellant no. 2 had started staying in Calcutta with his wife, as he was incapacitated in an accident. After a lapse of seven years of the ex parte judgment and decree dated 23.12.1994/5.1.1995, the Asst. General Manager, Zonal Office of respondent-Bank vide Letter No. 338/20/9597/REC/AG/2001 dated 22.2.2001 intimated the appellant no. 2 about the ex parte judgment and decree in his Calcutta (now Kolkata) address. Thus, the appellant No.2 came to know about the same and after making a detailed enquiry and inspection of the case record, the appellants filed the petition under Order 9 Rule 13 C.P.C.

3. The respondent as opposite party filed objection denying the assertion made in the petition under Order 9 Rule 13 C.P.C. It was contended that notice was duly served on the defendants-appellants in their address at Cuttack and Titilagarh. Further, a substituted notice under Order 5 Rule 20 C.P.C. was also taken on the defendants-appellants by publication of the notice in a widely circulated Oriya daily newspaper, namely, 'Dharitri' at Cuttack and Titilagarh. Thus, the defendants-appellants were fully aware of the suit filed for realization of the loan dues outstanding against them. They had deliberately taken a false plea in order to avoid payment of dues outstanding against them. Even before filing of the suit they were repeatedly requested for repayment of the loan as per the terms and conditions of the loan agreement and on failure of repayment of the same, the suit was filed against them for recovery of the dues after taking all possible steps as per the provisions of law. In spite of due service of notice and when they did not turn up to appear and contest the suit, the same was decreed ex parte. When they came to know that the respondent-Bank is taking steps to file execution case for realization of the loan dues, they filed a petition under Order 9 Rule 13 C.P.C. after lapse of seven years from the date of ex parte decree. The delay in filing the petition under Order 9 Rule 13 C.P.C. was also not properly explained. Hence, they prayed for dismissal of the petition filed under Order 9 Rule 13 C.P.C.

4. To substantiate their respective cases, the defendant-appellant no. 2 examined himself as P.W. 1 and filed several documents marked as Exts.1 to 25(a). On the contrary, the plaintiff-respondent-bank neither examined any witness nor filed any document in support of his case. On a threadbare discussion of the contentions raised by the respective parties and scrutinizing the materials available on record, the learned trial court came to a categorical finding that it is not proved by the plaintiff-respondent that Odia daily "Dharitri" had any circulation in the locality where the defendant-appellant no. 2 was residing so as to hold that notice in the suit came to the knowledge of the defendant-appellant no. 2. Thus, there was no effective service of summons on the defendant-appellants under Order 5 Rule 20 C.P.C. However, In view of the specific provisions under Sections 18 and 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act, 1993') and taking into consideration the view expressed by the Full Bench of Kerala High Court in the case of ***C.J. Glenny s/o Chemmannur Joseph***, reported in AIR 2003 (Kerala) 373 and distinguishing the contrary view expressed by the Calcutta and Patna High Courts, the learned Civil Judge held that the petition under Order 9 Rule 13 C.P.C. filed by the defendants-appellants for setting aside the ex parte decree cannot be disposed of in their favour for want of jurisdiction. Thus, the only point that arises for consideration in this appeal is whether in view of the provisions

under Sections 18 and 19 of the Act, 1993, the learned Civil Court has jurisdiction to entertain a petition under Order 9 Rule 13 C.P.C. In this context, it is profitable to go through the provisions under Order 9 Rule 13 C.P.C., which reads as follows:

> "13. **Setting aside decree ex parte against defendant** - 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; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, an shall appoint a day for proceeding with the suit:
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> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
>
> Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

5. Thus, it is clear from the provisions under Order 9 Rule 13 C.P.C. that the defendant in order to set aside an ex parte decree shall have to make an application to the Court by which the ex parte decree was passed. On the other hand, sub-section (4) of Section 1 of the Act, 1993 provides that the provisions of the said Act shall not apply where the amount of debt due to any Bank or Financial Institution is less than Rs.10.00 lakh or such other amount being not less than Rs. 1.00 lakh as the Central Government may by

notification specify. Debt has been defined in Section 2(g) of the Act, 1993 which means any liability inclusive of interest which is claimed as due from any person by a bank or a financial institution etc. Thus, it is clear from the aforesaid provisions of the Act, 1993 that the Debt Recovery Tribunal has jurisdiction to entertain an application under Section 19 of the Act, 1993 where the debt inclusive of interest is not less than Rs. 10.00 lakh. Section 18 imposes a bar on jurisdiction of the Courts or other authority except the Hon'ble Supreme Court or High Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India to exercise jurisdiction, power and authority to entertain and decide the application from the Banks and Financial Institutions for recovery of debt due to such financial institution. Section 19 of the Act provides the manner of the application to the Tribunal. Section 22 provides the procedure and powers of the Tribunal and the Appellate Tribunal. Section 22(2)(g) provides the powers of the Tribunal to set aside any order of dismissal of any application for default or any order passed by it *ex parte*. In view of the aforesaid provisions of the Code of Civil Procedure and the Act, 1993, it has to be examined whether the petition under Order 9 Rule 13 C.P.C. filed by the present appellants could have been entertained by the Civil Court. The learned Civil Judge relied upon the full bench decision of Kerala High Court in the case of ***C.J. Glenny, S/o. Chemmannur Joseph –***

v- The Catholic Syrian Bank Ltd., reported in AIR 2003 Kerala 373, wherein it has been held at paragraph-25 as follows:

> "25. This contention cannot be accepted. It is undoubtedly true that under Section 22 the tribunal is not bound to follow the provisions of the Code of Civil Procedure. But the parliament has given it the power to devise its own procedure. Such a procedure has to be in conformity with the principles of natural justice. Still further, it has the power of a Civil Court in respect of the matters specified in Sub-clauses (a) to (h) of Clause (2). This includes the power to set aside an ex parte order. It is true that in Sub-clause (g), the expression is "setting aside any order.....passed by it ex parte." Since the ex parte Decree had been passed by the Civil Court, it can legitimately be contended that the provisions of Section 22(2)(g) are not, strictly speaking, applicable. However, in this situation it deserves mention that the tribunal would be entitled to evolve any fair procedure, which may conform to the principles of natural justice. If it finds that the appellant had not been duly served, the Tribunal shall be entitled to set aside the ex parte Decree."

On the contrary, the High Court of Patna in the case of ***Durga Prasad Sah v. State of Bihar and others,*** reported in AIR 2003 Patna 102, has held as follows:

> 21. In the above-quoted provision the underlined expressions clearly indicate that the question of transfer of pending cases would be determined on the basis of the cause of action on which the suit or proceeding was based. In other words, if the cause of action was such that the suit or proceeding would be instituted before a Civil Court even after the coming into force of the Act, that suit nor proceeding shall continue before the Civil Court and shall not be transferred to the Tribunal. In terms of Section 31 it is the cause of action on which the suit or the proceeding was based that would determined its transferability to the Tribunal and any interest accruing pendente lite is of no consequence and, therefore, it cannot be argued that since on the appointed date the Bank's debt had exceeded Rs. 10 lacs, the suit was

> liable to be transferred to the Tribunal. In the case in hand the suit was filed for recovery of a sum of Rs. 4,95,016.15 paise and a suit on that cause of action would still be filed before a Civil Court and not before the Tribunal. Hence, the money suit filed by the respondent-Bank was not liable to be transferred to the Tribunal on the appointed date.
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> 22. To my mind any other interpretation would lead to highly anomalous and impractical consequences. A suit for recovery of a sum below Rs. 10 lacs, the ceiling fixed under Section 1(4) of the Act, must still be filed before a Civil Court. Now, if the accrual of interest is also to be taken into account then all suits filed for recovery of sums ranging for instance, from 5-9-99 lacs would be getting transferred from the Civil Court to the Tribunal at different stages of hearing. This, to my mind, would be a very awkward and undesirable way to conduct a judicial proceeding. I am, therefore, clearly of the opinion that it would be the amount sought to be recovered on the date of institution of the suit that would determine the forum for its institution. In case the amount of debts, as on the institution of the suit is below Rs. 10 lacs the suit must be instituted before the civil Court but in case on the date the decree is made, the amount of debt exceeds Rs. 10 lacs, by accrual of interest, the execution of the decree can only take place before the Tribunal in terms of Section 3-A of the Act and this is exactly what has happened in this case."

Further, the High Court of Calcutta in the case of ***Allahabad Bank v. Ghanshyam Das Damani,*** reported in AIR 1998 Calcutta 243, has held as follows:

> "6. Therefore, the Order 9, Rule 13 of the Code of Civil Procedure and Section 22(2)(g) will be read side by side. In the earlier one the Court which has passed decree can pass an order to set aside and in the later one setting aside any order of dismissal of any application for default or any order passed by 'it' ex parte. The cardinal principle is if the suit is decreed ex parte by the Civil Court it should be revived by the Civil Court alone and if order is

> passed ex parte before the Tribunal it will be revived by it alone. If the suit decreed by the High Court and recalled by the tribunal under control and supervision of such High Court, it will be a last day of the judiciary. Incidentally High Court is one having different jurisdiction. There should be a limitation as to how far Tribunal should proceed with a matter assigned before it and an unfettered right to the Tribunal, if at all given by the legislature may create hazardous situation in the judicial discipline.
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> 7. Moreover the suit filed in the Original Side is to be guided by the Original Side Rules. Original Side Rules has prevailing effect over the Code of Civil Procedure. In such a situation, an application of Order 9, Rule 13 cannot be said to be an application under Order 9, Rule 13 of the Code of Civil Procedure alone but an application both under the Original Side Rules as well as Code of Civil Procedure. Section 22 of the Recovery of Debts Due to Banks and Financial institutions Act, 1993 speak about the Code of Civil Procedure, 1908 but silent about the Original Side Rules of a chartered High Court although there are various chartered High Courts in the country. The law-maker did not think about this aspect at the time of making the law."

6. The learned Civil Judge placed reliance on the full bench decision of Kerala High Court and came to a conclusion that when the ex parte decree was passed for recovery of Rs.6,37,393.75 together with *pendente lite* and future interest at the contractual rate, it would be more than Rs.10.00 lakh by the date the *ex parte* decree was passed. Thus, the learned Civil Court does not have any jurisdiction to entertain the application under Order 9 Rule 13 C.P.C.

7. Mr. Samal, learned counsel for the appellants relied upon the decision in the case of ***Garikapatti Veeraya –v- N. Subbiah Choudhury***, reported in AIR 1957 SC 540, wherein it is

held that the institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit and submitted that in view of the specific provisions under Order 9 Rule 13 C.P.C. and the ratio decided in the case of *Garikapatti Veeraya* (*Supra*), the only inference that can be drawn that the application under Order 9 Rule 13 C.P.C. is maintainable before the Civil Court. Moreover, the learned Civil Judge on speculation has held that the debt due to the bank would be more than Rs.10.00 lakh on the date when the ex parte decree was passed. There is no basis of such speculation. The learned Civil Judge has also not assigned any reason to come to such a conclusion. The decree was for Rs. 6,37,393.75 together with *pendente lite* and future interest. Thus, unless it is calculated in the execution proceeding, it cannot be said that the debt due to the respondent is more than Rs.10.00 lakh. He further submitted that the decision of Kerala High Court in the case of *C.J. Glenny (supra)* is not applicable to the case at hand simply because the decree in the said case was for an amount of Rs.11.00 lakh. He further submitted that the decisions of Patna High Court and Calcutta High Court are more akin to the case at hand and thus, the ratio decided therein is applicable to the case at hand. He further submitted that even for the sake of argument, if it is assumed that the decision of Kerala High Court in the case of *C.J. Glenny* (*supra*) is applicable to the case at hand, then also the learned Civil Judge could not have dismissed

the application under Order 9 Rule 13 C.P.C. The proper procedure would have been to return the application to the appellants to be presented before the Tribunal as held in the said decision.

8. Mr. Udgata, learned counsel for the respondent, per contra, submitted that T.S. No. 29 of 1988 was filed for realization of an amount of Rs. 6,37.393.75 along with *pendente lite* and future interest at the rate of 16% along with other reliefs. The *ex-parte* decree was passed on 23.12.1994 for recovery of an amount of Rs.6,37,393.75 with *pendente lite* and future interest as per the contractual rate with cost. Thus, on a plain calculation, debt due to the bank would be much more than Rs. 10.00 lakh on the date when the *ex-parte* decree was passed and it needs no further calculation at least for the purpose of determining the pecuniary jurisdiction of the Civil Court. He also relied upon the decision of Kerala High Court in the case of *C.J. Glenny (supra)* and submitted that in the said case, the suit was filed by the bank for recovery of the amount of Rs.8,61,530/- with *pendente lite* and future interest. In the said case also, a petition under Order 9 Rule 13 C.P.C. was filed before the Civil Court for setting aside the *ex-parte* decree and while adjudicating the matter, the High Court of Kerala in the said decision held that the petition would be maintainable before the Tribunal.

9. In view of the rival contentions of the parties and the provisions of law as well as the decisions cited above, this Court finds that the ratio decided in the case of *Garikapatti Veeraya*

(supra) at paragraph-23 has relevance for just decision of this case, which is quoted below:-

> "23. From the decisions cited above the following principles clearly emerge:
> (i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
> (ii) The right of appeal is not a mere matter of procedure but is a substantive right.
> (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
> (iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
> (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

10. Thus, it is clear from the aforesaid decision that all right available to the litigant on the date of institution of the legal proceeding, i.e., suit are crystallized and preserved to the parties thereto till the rest of the career of the suit unless the same is taken away of by an enactment or by necessary intendment. Provision under Section 22(2)(g) of the Act, 1993 provides that the tribunal shall have the power to set aside any order of dismissal of any application for default or any order passed by 'it' *ex-parte.* From the

above, a doubt may arise that when the *ex-parte* decree is passed by the Civil Court and not by the Tribunal, the latter (Tribunal) has no jurisdiction to set it aside. It can only set aside an order (or in that case 'a decree') passed by it *ex-parte*. But, the said doubt is clarified at paragraph-25 of the Full Bench decision of Kerala High Court in case of *C.J. Glenny (supra)* quoted herein above. Further, in the case of *Durga Prasad Sah (supra),* it has been clearly held that if on the date the decree is passed/made the amount of debt exceeds Rs.10 lakh by accrual of interest, the execution of the decree can only take place before the Tribunal. Ordinarily the decree is executed by the Court which passed it or by the Court to which it is sent for execution (Section 38), subject to the provision under Section 37 C.P.C. The principle is equally applicable to a petition under Order 9 Rule 13 C.P.C. Further, at paragraph 41 of the case of *C.J. Glenny (supra)* reads as follows:-

> "41. The issue regarding the maintainability of an application under Order 9, Rule 13 was also considered by a learned Single Judge of the Patna High Court in Ram Laxman Glass (P) Ltd. v. State of Bihar, AIR 2000 Pat, 210 it was observed as under:
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> "In the scheme of the Act, creation of the jurisdiction to try the suits and transfer thereof, to the Tribunal is total, subject to the exception of pending appeals. The main matter shall automatically stand transferred by operation of law along with all the steps taken in that direction on the appointed day. After all the applications for setting aside the ex parte judgment is an adjunct to the main matter and has no separate existence de hors the same. There is yet another aspect of the matter. In view of the nature and scope of Section

> 31(2)(b) of the Act discussed in this Judgment, if the Civil Court is allowed to retain jurisdiction over an application vide Order 9, Rule 13, the provisions of Section 31(2)(b) is rendered unworkable, nay the whole Act, which is clearly demonstrated by the facts and circumstances of the present case itself. After the entire records including the application under Order 9, Rule 13 was transferred to the Tribunal, it decided to proceed de novo and the very existence of the application came to an end. In this view of the matter also, there is no scope to hold that the same Court shall deal with such an application, which had passed the ex parte Judgment and Decree. That principle is applicable in the usual situation where the jurisdiction in the main matter continues with the same Court and not in a situation like the present one where the jurisdiction has been completely abolished. Section 9, C.P.C. provides that The Courts (subject to the provisions herein contained), have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred....' Where has in the present case remained the scope with the Civil Court to deal with the applications? And the overriding factor with its brooding omnipresence is the legislative intent, purpose and the scheme of the Act that the transfer of jurisdiction to the Tribunal is total, except the appeals which were pending on the appointed day which is transient. If the substratum is gone, where is the question of the super structure."

Thus, on a conjoint reading of Section 18, 19 and 22 (2)(g) and 31 of the Act, 1993, it can be safely held that when the amount due to the bank is not less than Rs.10.00 lakh, the jurisdiction of the Civil Court is ousted to entertain an application under Order 9 Rule 13 C.P.C. The ratio decided in the case of *Ghanshyam Das Damani (Supra)* is not applicable to the case at hand, as the consideration thereon was completely different. Thus, it

is held that where a decree passed for recovery of debt is not less than Rs.10.00 lakh a proceeding, be it a petition under Order 9 Rule 13 C.P.C. or for execution or an appeal from the said decree, would lie to the Tribunal and not to the Civil Court.

11. However, it appears that the learned Civil Judge has made a speculation that the decree would be more than Rs.10.00 lakh, which is without any basis. No material was available before the learned Civil Judge to come to such a conclusion. Further, even if it is held that the decree would be for an amount not less than Rs.10.00 lakh, then the proper procedure would have been to return the petition to be presented before the Tribunal and thus, the learned Civil Judge has acted illegally in dismissing the petition under Order 9 Rule 13 C.P.C. for want of jurisdiction.

12. In view of the discussions made above, the impugned order is not sustainable in law and the same is accordingly set aside. The matter is remitted back to the learned Civil Judge (Senior Division), Titilagarh to reconsider the aforesaid application in the light of the discussions made above by giving opportunity of hearing to the parties concerned.

13. The appeal is accordingly allowed, but in the circumstances, there shall be no order as to costs.

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K.R. Mohapatra, J.

Orissa High Court, Cuttack
Dated the 29th April, 2016/bks/ss