(2004) 1 ALLMR 525 : (2004) 2 BC 485 : (2004) 2 BomCR 307 : (2005) 126 CompCas 846 : (2004) 4 MhLj 492

Bombay High Court (Nagpur Bench)

Case No: Letters Patent Appeal No. 131 of 2003

Rajkumar Agarwal	APPELLANT
Vs	
The Debts Recovery Appellate Tribunal and Others	RESPONDENT

Date of Decision: June 17, 2003

Acts Referred:
Constitution of India, 1950 â€" Article 226, 227#Recovery of Debts Due to Banks and Financial Institutions Act, 1993 â€" Section 19, 20, 22

Citation: (2004) 1 ALLMR 525 : (2004) 2 BC 485 : (2004) 2 BomCR 307 : (2005) 126 CompCas 846 : (2004) 4 MhLj 492

Hon'ble Judges: S.T. Kharche, J; R.J. Kochar, J

Bench: Division Bench

Advocate: S.S. Joshi, for the Appellant; A.V. Khare, for Respdt. No. 3, for the Respondent

Final Decision: Allowed

Judgement

R.J. Kochar, J.
Appeal is admitted and by consent heard forthwith. Respondent No.3 waives service and the respondent no.3 is the only

contesting party. Other respondents need not be heard here. They had not even appeared before the Tribunal.

2. The appellant is aggrieved by the order passed by the learned Single Judge on 16.4.2003. The learned Single Judge was pleased to dismiss the

petition filed by the petitioner who was aggrieved by the order passed by the Debts Recovery Tribunal and also by the order passed by the Debts

Recovery Appellate Tribunal at Mumbai.

3. The facts, in brief, can be narrated as under:

The respondent no.3/bank had instituted proceedings against respondents no.4, 5, 6, 7 and 8 u/s 19 of the Recovery of Debts Due to Banks and

Financial Institutions Act (""the Act"" for short) for recovery of Rs.12,65,642/-. The respondent no.4 was the principal borrower of the loan from

the respondent no.3/bank. The appellant and the other respondents were impleaded as the respondents before the Tribunal in the capacity of the

guarantors for the respondent no.4. It appears from the proceedings that except the appellant no other respondent contested the claim of the

respondent no.3/bank. The appellant appeared before the Tribunal and filed his written statement on 26.3.2002 contesting the claim of the bank

inter-alia on the ground that he had not signed the alleged guarantee papers and he was not a guarantor for the loan given by the bank to the

respondent no.4. At the outset, in paragraph no.1 of his reply, he seriously contested the claim of the bank that he was a guarantor for the

respondent no.4. He, therefore, filed two separate applications on 20.5.2002, one to delete his name from the O.A. and the other to request the

Tribunal to send the alleged signature on the bank guarantee papers for the opinion of any hand writing expert who would compare the specimen

signatures of the appellant which he had given with his written statement. The Bank filed its reply to the said applications to oppose the prayers of

the appellant.

4. It appears from the pleadings that the appellant who was impleaded as defendant no.2 before the Tribunal appeared on receipt of the summons

on 11.2.2002. On that date the bank was directed to furnish the copy of the original application filed by the respondent no.4 before the Tribunal.

On 14.3.2002 the appellant received the copy of the original application along with the documents from the bank and on 26.4.2002 he filed his

written statement specifically denying the allegation of the bank that he had executed the alleged guarantee-deed at any point of time. The

appellant, therefore, raised a preliminary issue in respect of maintainability of the O.A. against him and prayed that the issue regarding the signing of

the guarantee-deed be tried as a preliminary issue. It appears that since no such preliminary issue was framed by the Tribunal, he filed on

20.5.2002 two separate applications, one to delete him from the O.A. and another for appointment of hand writing expert with a direction to

examine the signature appearing on the bank guarantee and the other signatures of the appellant as specified in the said application as appended

with the written statement filed by him. The Tribunal dismissed the said application by its order dated 15.7.2002. The appellant was aggrieved by

the said order and, therefore, he filed an Appeal u/s 20 of the Act. The Appellate Tribunal vide its order dated 28.1.2003 dismissed the Appeal

and confirmed the order of the Tribunal. The appellant thereafter has approached this Court under Articles 226 and 227 of the Constitution of

India against the order passed by the Appellate Tribunal. The learned Single Judge of this Court was pleased to reject the petition in limine after

hearing the parties. The appellant has approached this Court by filing the present Letters Patent Appeal. The order passed by the learned Single

Judge is reproduced herein below for the sake of convenience -

I have considered the contentions canvassed by the respective learned counsel for the parties and perused the impugned order. The observations

in the impugned order reveal that petitioner was served with summons of the original application in the year 2000. However, he had filed the

application in question only in the year 2002 when the matter was kept for final arguments. Considering this aspect and also other aspects, the

Debts Recovery Appellate Tribunal rejected the appeal. At this stage, it is brought to the notice of this Court by the learned counsel for the

respondent no.3 Bank that the notice was served on the petitioner prior to filing of the Original application before the Tribunal. Be that as it may,

no case is made out for interference. The petition is dismissed.

From the order which we have reproduced hereinabove, it is clear that the learned Single Judge was given to understand that though the appellant

was served with the summons of the original application in the year 2000, he filed an application for appointment of hand writing expert in the year

2002 when the matter was kept for final arguments. The learned counsel appearing for the appellant submitted that the said observation in the

order of the learned Single Judge is factually incorrect and contrary to the record, as the appellant was served with the summons sometimes

between 25.1.2002 and 11.2.2002 and he filed his appearance in the Tribunal on 11.2.2002 when the bank was directed to furnish the copy of

the original application and the documents. The learned counsel further pointed out that on 14.3.2002 he was furnished with the copy of the

Original Application and the documents by the bank and thereafter he filed his written statement on 26.4.2003 denying specifically the execution of

the guarantee and asserting that he had never signed the alleged guarantee and denying any liability to pay the debt of the principal borrower. It

would be useful to produce the exact plea of the Appellant in his written statement :

1. At the very outset, it is submitted that defendant no.2 has no concern whatsoever, with the instant matter. he has been arrayed as defendant

alleging that he has signed the guarantee deed and stood as guarantor for the defendant no.1 for the loan advanced for the defendant no.1 only. It

is most humbly submitted that this defendant never appeared before the Bank, nor did he signed the guarantee deed at any point of time, the

guarantee deed which is document no.3 attached with the plaint does not bear signature of this defendant. In view of this fact, when this defendant

never signed the guarantee deed nor he showed his willingness to stood as a guarantor and defendant no.1, this defendant cannot be made liable

under the said guarantee deed or any other deed moreover, his name be deleted from the array of defendant. [The specimen signature of the

defendant no.2 is attached herewith at Anx I, II & III]

5. It appears that the delay in filing the application for appointment of hand writing expert had weighed with the learned Single Judge to reject the

petition in limine. It appears that he was given to understand that the matter was kept for final hearing and that to delay the proceedings the

appellant had on the last date at the last moment filed such application for appointment of hand writing expert. We find merit in the submission of

the learned counsel for the appellant. It appears that the facts disclosed to the learned Single Judge were not correct as a result of which a grave

error of miscarriage of justice has taken place. It appears from the record that the appellant was served with the summons from the Tribunal on

11.2.2002 and not in the year 2000, as urged before the learned Single Judge. It also appears from the record and particularly from the Roznama

maintained by the Tribunal that as late as on 8.1.2002 the appellant was not served and summons of service on defendants 3, 4 and 6 were

returned unsaved. They were therefore called out on 8.1.2002 and were proceeded ex parte. It further appears that the defendant no.5 in the

application had filed his Vakalatnama and prayed for permission to file his written statement. The Roznama further indicates that on 15.1.2002 the

learned Advocate for the bank filed pursis stating that summons was served on defendant no.2 but acknowledgement was not received. It further

appears that the matter was posted for awaiting acknowledgement of the receipt of summons on the appellant and for written statement of

defendant no.5. The matter was further adjourned on the same ground on 25.1.2002 and thereafter it was adjourned to 11.2.2002. On 11.2.2002

Ms.Manjarkhede, the learned advocate, filed Vakalatnama on behalf of the appellant. On that date she was furnished with the copies of the

proceedings. On that date itself, the matter proceeded ex parte against defendant no.5 who did not file his written statement. On 01.03.2002 the

learned advocate for defendant no.5 filed an application praying for setting aside the order to proceed ex parte against her client. The hearing of

the application was adjourned to 14.3.2002. On 26.4.2002 the appellant filed his written statement. On 7.5.2002 the learned Tribunal curiously

enough rejected the application seeking permission by the defendant no.5 to file a written statement, though the entire application was pending final

hearing. No prejudice of any nature would have been caused to any one if the learned Tribunal had taken the written statement on file on behalf of

the defendant no.5. The original application is still pending before the Tribunal. It appears that the Tribunal has acted in an unwarranted haste in

refusing permission to defendant no.5 to file his written statement. Since the defendant no.5 is not before us, we say nothing more. It would be

open to him to again apply to the Tribunal seeking permission to file his written statement and we hope that the Tribunal shall take on record the

written statement of the defendant no.5 when the matter is still pending final disposal.

6. Thereafter a number of adjournments were given on one or the other ground. The Tribunal finally dismissed the applications filed by the

appellant for sending the alleged signature on the guarantee to a hand writing expert and to delete his name from the original application as he was

not a guarantor for the principal borrower, as alleged by the bank. The Tribunal has rejected the application by observing in paragraphs 6, 7 and 8

of the order, which read as under :

6. The Debts Recovery Tribunal is a Tribunal and not a Court, the proceedings before it are initiated on an application and not upon suit. The

Tribunal does not pass a decree. It only issues a certificate which liable to be executed through the Recovery Officer. Procedure contemplated

under the act is a summary procedure. The provisions of C.P.C. can not be made applicable to the procedure prescribed under Recovery of

Debts Due to Banks and Financial Institutions Act. The Tribunals are guided u/s 22 of the Recovery of Debts Due to Banks and Financial

Institutions by the principles of natural justice. The Tribunal has the power to regulate its own procedure.

7. It is pertinent to note that when the notice was issued to the defendants including defendant no.2 by the applicant bank on 21/2/2000 to

demanding payment of the outstanding dues due to the applicant bank. The defendant no.2 did not care to give reply alleging that he never stood

as guarantor and that he did not sign in the deed of guarantee etc. If a party by his conduct relinquishes the objections which he should have raised

and it is in the manner as if no irregularity, he shall be bound by the rule of waiver.

8. Apart from that, there is no necessity for the bank officers to forge signatures of 2nd defendant on the guarantee deed in order to fasten the

liability on defendant no.2. By fabricating such documents, the bank officers are not getting any personal gain. This is only a frivolous application

filed by defendant no.2 to protract the proceedings. If this sort of applications are entertained, it is not possible to dispose of the original

applications within six months as per the provisions of Debts Recovery Tribunal Act.

With respect to the learned Presiding Officer of the Tribunal, we must observe that the above quoted opinion of the learned Tribunal suffers from

basic misgivings and misunderstanding of law. It is no doubt true that the Tribunal does not pass a Decree but issues a Certificate which has to be

executed through the Recovery Officer as a decree. Such a certificate issued by the Tribunal at the end of the hearing of the application by the

creditor-bank partakes a character of a decree, though it is called a Certificate under this Act. We must also observe that the technicalities of the

CPC are not made applicable to the proceedings before the Tribunal, but at the same time the underlying principles of the CPC cannot be ignored

at all by the Tribunal as the underlying philosophy of the CPC is nothing but elaborate codification of the principles of natural justice. What is

contemplated under the CPC and also by the principles of natural justice is a fair, reasonable and adequate opportunity to be afforded to the

parties to put up their respective contentions before the Court/Tribunal. There is no doubt that the Tribunal has to regulate its own procedure, but

the Tribunal must remember that while regulating such procedure, it does not violate the basic principles of natural justice of granting reasonable

and adequate opportunity to the parties. Besides, even the Tribunal is vested with certain powers of a Civil Court under S. 22 of the Act. In the

present case, the Tribunal has violated the basic principles of natural justice by denying a fair opportunity of hearing to the appellant. It does not

appear from the record or the Roznama that the appellant was trying to prolong the matter. At the earliest opportunity available to him after service

of summons, he filed his written statement and in the very first paragraph of his written statement, which we have reproduced hereinabove, denied

his liability in the matter and denied the fact that he was a guarantor and had signed the bank guarantee in favour of the principal borrower. In our

opinion, the learned Member of the Tribunal committed a grave error of dismissing the application filed by the appellant for appointing a hand

writing expert to compare the signatures of the appellant as specified by him and the alleged signature relied on by the bank on the alleged

guarantee. The appellant has been denied fair opportunity of hearing by the Tribunal. It appears that the Tribunal has held against the appellant only

because he did not send a reply to the notice sent by the advocate of the bank. Assuming that he received the notice and failed to reply the same,

can we rush to a conclusion that failure on the part of the party to reply a notice would automatically result into a decree? We answer certainly no.

Failure to reply the notice certainly does not amount to admission of the claim or waiver of any objection, as erroneously held by the Tribunal. It

would also depend on the fact of receipt of such notice by the addressee. Reply or no reply to a notice would be only one of the factors to be

considered at the time of decision of the matter. Merely because the appellant did not send reply to the notice served by the bank, we cannot rush

to a conclusion that the appellant was liable to pay to the bank on behalf of the principal borrower such a huge amount of the debt. The Tribunal

has not at all considered the pleadings of the appellant in the written statement. He has categorically denied the allegation that he had signed any

guarantee on behalf of the principal borrower. The only factor which has gone against the appellant is the allegation made by the bank that the

appellant did not give reply to the notice sent through its advocate. Unfortunately, the Appellate Tribunal has not applied its mind to the pleadings

of the appellant and has factually committed a mistake to assume that the appellant was served in the year 2000 with the summons from the

Tribunal. There has been a confusion in respect of the service of a notice by the bank in the year 2000 and service of summons from the Tribunal in

February 2002. The learned Member of the Tribunal as well as the learned Chairperson of the Appellate Tribunal were given a wrong and

baseless impression that the appellant was trying to prolong or protract the proceedings, while from the record we are satisfied that that was not

the case. The Appellate Tribunal has also committed a clear error of fact by observing that even in the written statement filed by the appellant there

was no clear and category averment to the effect that he had not signed the bank guarantee. It appears that the attention of the learned Appellate

Tribunal was not drawn to the clear averments made by the appellant in the very first paragraph of his written statement which we have specifically

quoted hereinabove. The learned Chairperson of the Appellate Tribunal has formed a mistaken impression that the appellant had applied for

appointment of hand writing expert when the matter was at the crucial stage of final hearing. From the Roznama, which we have set out, it is clear

that it was not the crucial stage of final hearing. The appellant had filed his written statement and denied that he had ever signed the guarantee, as

alleged by the bank. The question is not whether the Presiding Officer can compare the signatures and come to his own conclusion and that he will

not be bound by the hand writing experts opinion. The question which we are required to answer is whether the appellant had at the earliest

opportunity denied the liability which was tried to be foisted on him through the guarantee alleging that he had signed as the guarantor for the

principal borrower. The appellant has very categorically denied this fact and was entitled to prove that he had not signed the said guarantee. He

has come out with a very specific case that the signature which appears on the guarantee as relied on by the bank was not his signature. He has on

his own produced three specimen signatures for comparison by the hand writing expert. With respect to the learned Chairperson, we do not think

that the entire exercise was unnecessary in view of the conduct of the appellant. We do not find anything wrong in the conduct of the appellant. The

castigation of the appellant in such manner is unfair to him and at the same time is not supported by any material on record. We find that the

appellant had at the first opportunity filed his written statement denying his liability which has been totally ignored by the learned Presiding Officer

of the Tribunal as also by the learned Chairperson of the Appellate Tribunal. According to us, both have committed grave error of facts and also

law and have caused through their orders grave injustice and miscarriage of justice to the appellant. Finally, it would perhaps be proved beyond

any reasonable doubt that the signature on the bank guarantee was not that of the appellant and that he would perhaps be discharged honorably

from the debt as a guarantor, as alleged by the bank. The appellant has every right to plead and prove that he was not a party to the transaction in

which he was being implicated. We must also bear in mind that the principal borrower and others are deliberately remaining away from the

Tribunal for the reasons best known to them and the whole liability is being foisted on the Appellant. Unfortunately, even the learned Single Judge

of our Court has also lost sight of the crucial facts on record and erroneously concluded that the Appellant was served with summons of the

Tribunal in the year 2000 and that he filed the applications under questions in the year 2002 when the matter was kept for final arguments. He also

mistook the notice of the Banks Advocate sent in the year 2000 as the summons of the Tribunal which undisputedly were received by the

Appellant on or about 11.2.2002 and he was given the copies of the O.A. and the documents in the Tribunal on 14.3.2002. There is nothing on

record to show that the Bank had adduced any evidence to prove the facts of signature of the Appellant on the guarantee by examining the Officer

before whom the Appellant had allegedly signed. As the Appellant had unequivocally and categorically denied the alleged signature on the

guarantee, the guarantee could not be said to have been proved to be accepted as valid and conclusive evidence against the appellant. The Bank

has to examine the witness and offer him for cross-examination to the Appellant. We, therefore, fail to understand how in the absence of crucial

and material evidence the Tribunals could decide the liability fastened on the Appellant. In the face of denial of the signature of the Appellant on the

guarantee and in the absence of any evidence adduced by the Bank, the O.A. will have to be dismissed against the Appellant. There is nothing on

record to conclude that the Bank did not want to adduce any evidence and that the matter was therefore for final arguments as observed by the

Tribunals below and the learned Single Judge. The matter was only at the interlocutory stage and, therefore, there was no question of it being at the

stage of final arguments. Summary proceedings do not over throw the board the principles of natural justice and hearing in accordance with law. It

does not mean that the defence of the party should be shut out and that he should be totally gagged. From the facts which have come on surface of

the record, we are more than satisfied that the Appellant did not get fair deal in his matter on account of clear error of facts and loss of sight of the

plea of the Appellant. We have also failed to appreciate the logic of the learned Presiding Officer that there was no necessity for the Bank Officers

to forge signature of the Appellant on the guarantee and that they are not getting any personal gain. There are a host of reasons which get clear

from evidence to unearth the motive and truth. The Tribunal was not justified in rejecting the Application of the Appellant as frivolous when that

was the lifeline of his defence. There is no presumption in law that the Bank documents and the Bank Officers are always truthful and the citizens or

the borrowers are always false or liars. The Tribunals must change such presumptive approach in favour of the Banks and the Financial Institutions

which are also manned by the frail human beings. There is nothing sacrosanct about them and their documents which are subject to the Law of

Evidence.

7. Today when the Appeal was called out, the learned counsel for the respondent no.3/bank has fairly made a statement that the bank will not

object to the reference being made to a hand writing expert by the Tribunal and that they will give consent to the alleged signature of the appellant

on the guarantee to be referred to the hand writing expert. In view of this fair stand taken by the respondent/bank, nothing survives in the present

matter, though however, we have decided the Appeal on its merits and not on the concessions made by the learned counsel for the Bank under

instructions.

8. The Tribunal shall refer the alleged signature on the guarantee on which the respondent/bank is relying to be the signature of the appellant to any

hand writing expert. The appellant shall also produce his original signatures on his passport, driving license and his bank opening form, which he

has produced before the Tribunal with his written statement. These specimen signatures would be for the period prior to the date of the guarantee-

deed. It is needless to mention that it will be for the respondent/bank to prove the signature of the appellant and in rebuttal the appellant would be

entitled to rely on the opinion of the hand writing expert in addition to other evidence available to substantiate his defence. The impugned orders

passed by the Presiding Officer of the Tribunal and also by the learned Chairperson of the Appellate Tribunal and the order passed by the learned

Single Judge are quashed and set aside and the Letters Patent Appeal stands allowed. In the circumstances, no order as to costs.