(2007) 10 CAL CK 0032

Calcutta High Court

Case No: C.O. No. 554 of 2007

Allahabad Bank		APPELLANT
	Vs	
Indo Marketing and Others		RESPONDENT

Date of Decision: Oct. 12, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Constitution of India, 1950 - Article 227
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 2

Citation: AIR 2008 Cal 40 : (2008) 1 CALLT 140 : (2008) 1 CHN 56 : 113 CWN 427

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Saktinath Mukherjee, S.P. Roychowdhury and Biswajit Sau, for the Appellant;Jayanta Mitra, Ranjan Deb, Arijit Banerjee, D.K. Pal and R. Chowdhury for Opposite Party No. 3, for the Respondent

Final Decision: Allowed

Judgement

Jyotirmay Bhattacharya, J.

This revisional application under Article 227 of the Constitution of India is directed against the Judgment and/or order dated 28th December, 2006 passed by the learned Debts Recovery Appellate Tribunal at Calcutta in Appeal No. 43 of 2003 modifying the Judgment and decree dated 15th June, 1995 passed by the learned Debts Recovery Tribunal, Calcutta in T.A. No. 15 of 1994 at the instance of the defendant/opposite party No. 3 herein.

2. In 1984, the plaintiff/petitioner (Bank) lent and advanced a sum of Rs. 26,00,000/- to the opposite party No. 1 herein on hypothecation of plant, machinery and stocks in the factory premises situated at Jaikuni, Goragachha Road, Kolkata-700 048. The defendant No. 2 stood as a guarantor for the said loan.

3. The opposite party No. 1 defaulted in payment of instalment towards the loan amount. As a result, a sum of Rs. 22,11,618.62p. was accumulated towards the said loan account inclusive of interest as on 29th February, 1988. Instead of making any attempt to repay the said loan amount, the opposite party Nos. 1 and 2 obstructed the petitioner herein in various ways from taking inspection of the securities i.e. the hypothecated articles at the factory premises of the opposite party No. 1.

4. Ultimately, the opposite party Nos. 1 and 2 illegally, arbitrarily and whimsically handed over the entire machineries, plants, equipments, stock-in-trade, goods in transit etc. to the defendant/opposite party No. 3 herein without the knowledge of the plaintiff. This clandestinfe activity of the defendants/opposite party Nos. 1, 2 and 3 has seriously jeopardised the bank''s interest.

5. The opposite party No. 3 by its letter dated 7th August, 1987 addressed to the opposite party No. 1 confirmed that the said opposite party took over possession of the factory along with its plants, machineries, equipments etc., on 3rd August, 1987. The defendant/opposite party No. 3 also confirmed that the said defendant took possession of the stock as per the list attached to its letter dated 7th August, 1987 for selling those stocks for realization of its alleged rental dues payable by the opposite party No. 1 to the opposite party No. 3 herein. The Bank was also intimated by the defendant/opposite party No. 3 by its letter dated 18th September, 1987 about the taking over possession of the factory along with the plants and machineries from the defendant/opposite party No. 2 at their request.

6. The defendant/opposite party No. 2 stated that he had no knowledge about the alleged hypothecation and/or the charge.

7. The plaintiff through its Advocate''s letter dated 1st September, 1987 called upon the defendants/opposite party Nos. 1 and 2 to repay the dues. But, the defendant Nos. 1 and 2 failed to pay the said dues and/or any part thereof to the plaintiff. Since the defendant/opposite party No. 3 entered into a clandestine deal with the defendants/opposite party Nos. 1 and 2 in taking over possession of the hypothecated goods as well as the other articles belonging to the defendant Nos. 1 and 2 to frustrate realisation of the petitioner''s claim from its debtors, the defendant/opposite party No. 3 is also jointly and severally liable to pay the Bank''s dues.

8. Under such circumstances, the plaintiff Bank claimed that all the defendants/opposite parties including the defendant/opposite party No. 3 are bound by the said notice.

9. In the aforesaid context, the plaintiff/petitioner (Bank) filed a suit for declaration and for enforcement of the charge over the securities on hypothecation and for realization of the Bank''s dues amounting to Rs. 22,11,618.62p. against the opposite parties herein in the Court of the learned Assistant District Judge, 2nd Court at Alipore. The said suit was registered as Title Suit No. 29 of 1988.

10. In spite of service of writ of summons of the said suit upon the opposite parties herein, none appeared on behalf of the opposite party Nos. 1 and 2 to contest the said suit. The defendant/opposite party No. 3, however, appeared in the said suit and filed written statement therein, but ultimately did not come forward to contest the said suit.

11. The said suit was, however, subsequently transferred to the Debts Recovery Tribunal at Calcutta after the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 came into operation. Since none contested the said suit even before the Tribunal, the said suit which was renumbered on transfer as T.A. No. 15 of 1994 was ultimately decreed ex-parte on 15th June, 1995 whereby it was declared that the Bank is entitled to realise the amount of Rs. 22,11,618.62p. only from the opposite parties jointly and severally. It was further declared that the Bank is also entitled to realise interest at the rate of 6% per annum on the above sum during the period from 14th March, 1988 i.e.. the date of filing of the plaint till the date of realisation of the same from the defendants. The Registrar was thus directed to issue a certificate accordingly.

12. The said defendants/opposite party Nos. 1 and 2 did not challenge the propriety of the said ex-parte decree in any higher forum. Thus, the defendants/opposite party Nos. 1 and 2 accepted the said decree.

13. The defendant/opposite party No. 3, however, made various attempts to get rid of the said decree. The said defendant initially filed an application under Order 9 Rule 13 of the CPC for setting aside the said ex-parte decree, but ultimately failed not only before the learned Tribunal but also before this Hon''ble Court and the SLP which was field by the said opposite party before the Hon''ble Supreme Court, was subsequently withdrawn. An attempt was thereafter made by the said defendant for challenging the propriety of the said decree in regular appeal and in fact, a regular appeal was filed along with an application for condonation of delay before the learned Appellate Tribunal. The delay was, however, not condoned by the learned Appellate Tribunal and consequently the appeal was also dismissed.

14. Being aggrieved by the said order, the defendant/opposite party No. 3 herein filed a revisional application before this Court earlier. The said revisional application which was registered as C.O. No. 1568 of 2004 was ultimately allowed by the learned single Judge of this Court on terms.

15. Thereafter, the appeal was heard on merit as the defendant/opposite party No. 3 complied with the condition regarding deposit of the requisite amount in terms of the order passed by the learned single Judge of this Court on 11th June, 2001 in the earlier revisional application being C.O. No. 1568 of 2004.

16. Before the appellate forum, the defendant/opposite party No. 3 took a stand that the decree which was passed against the said opposite party regarding its joint and several liability to satisfy the decretal amount, is a nullity as the Tribunal which

passed the said decree had no authority and/or jurisdiction to pass such a decree against the said opposite party under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

17. According to the said defendant/opposite party No. 3, the said Tribunal had no jurisdiction to entertain any application from the Bank for realization of any amount on account of damages which is not a debt due to bank from a non-debtor. The said opposite party claimed that since no relationship of creditor and debtor existed between the Bank and the said defendant/opposite party No. 3, the Tribunal ought not to have passed a decree fastening the liability of the said opposite party No. 3 in the process of realization of the debts recoverable by the Bank from its debtor, viz., the opposite party Nos. 1 and 2 herein.

18. The jurisdiction of the Tribunal to try the said suit for realisation of the Bank''s dues from its debtors, viz., opposite party Nos. 1 and 2, was not disputed by the opposite party No. 3 herein.

19. The learned Appellate Tribunal, on consideration of the rival submission of the parties and also on consideration of various decisions cited at the bar, ultimately came to a conclusion that the ex-parte decree passed against the opposite party No. 3 by the Debts Recovery Tribunal, Calcutta, is without jurisdiction and as such, the decree passed by the Debts Recovery Tribunal, Calcutta on 15th June, 1995 in T.A. No. 15 of 1994, so far as it relates to the opposite party No. 3 and certificate issued in pursuance thereof against the said opposite party, were set aside.

20. It was further directed by the learned Appellate Tribunal that the entire sum appropriated by the Bank in terms of the order of the Hon''ble High Court in C.O. No. 1568 of 2004 together with interest at the lending rate be refunded to the opposite party No. 3 by the Bank within a period of three months from the date of the decree.

21. While coming to the said conclusion, the learned Appellate Tribunal interpreted the definition of ''debt'' appearing in Section 2(g) of the said Act in its own way and held that ''debt'' within the meaning of the said Act means: (i) that ''debt'' means any liability; (ii) which is alleged as due from any person by a bank; (iii) during the course of any business activity undertaken by the bank; (iv) subsisting on, and legally recoverable on, the date of the application.

22. The learned Appellate Tribunal held that unless all these four ingredients are satisfied, there cannot be any debt which is recoverable under the said Act. The learned Appellate Tribunal found that there was no loan transaction between the petitioner (Bank) and the opposite party No. 3. The learned Appellate Tribunal further held that nothing is even alleged, as due from the opposite party No. 3 to the petitioner (Bank). The learned Appellate Tribunal also held that the opposite party No. 3 owed no liability which was even created during the course of any business activity undertaken by the Bank.

23. Thus, the learned Appellate Tribunal by analysing the definition of the debt in the manner as aforesaid, ultimately held that the decree which was passed by the learned Debts Recovery Tribunal, Calcutta against the said opposite party, is, in fact, a nullity as the said Tribunal had no jurisdiction to pass a decree against the said opposite party No. 3 which owed no debt to the petitioner (Bank).

24. The propriety of the said Judgment and/or order of the learned Appellate Tribunal is under challenge in this revisional application at the instance of the Bank.

25. Mr. Saktinath Mukherjee, learned Senior Counsel, appearing for the petitioner (Bank), submitted that though it is true that there was no creditor and debtor relationship between the petitioner (Bank) and the defendant/opposite party No. 3 as there was no loan transaction between them, but still then, the Debts Recovery Tribunal had the jurisdiction to pass a decree against the said opposite party No. 3 jointly with the other opposite parties and/or severally, as the opposite party No. 3 involved itself in a clandestine deal with the opposite party Nos. 1 and 2 being the admitted debtor of the Bank by accepting the delivery of the hypothecated goods as well as the other articles and materials from the opposite party Nos. 1 and 2 and thereby made a desperate attempt in collusion with the admitted debtors of the Bank to frustrate realization of the Bank''s dues against its admitted debtors with the knowledge of hypothecation.

26. Mr. Mukherjee further submitted that the expression "debt" has to be given the widest amplitude to mean any liability which is allegedly due from any person by a bank during the course of any business activity undertaken by the bank either in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any Court or otherwise and legally recoverable on the date of the application.

27. Mr. Mukherjee put much emphasis on the words as underlined above and submitted that the expression "any liability" and "or otherwise" are very significant which include any type of liability which arises otherwise than in the process as specified in the said provision.

28. Mr. Mukherjee further submitted that if the claim in question made by the plaintiff (Bank) is essentially one for recovery of a debt due to bank from the defendants, then the Tribunal has the exclusive jurisdiction to decide the dispute.

29. According to Mr. Mukherjee, a suit for recovery of debt from one of the defendants does not cease to become so merely because certain ancillary and incidental relief has been sought for against some other defendants.

30. In support of such submission, Mr. Mukherjee placed a strong reliance on a decision of the Hon''ble Supreme Court in the case of United Bank of India Vs. The Debts Recovery Tribunal and Others, .

31. Mr. Mukherjee submitted that if the expression "debt" appearing in Section 2(g) of the said Act is given a narrow interpretation as given by the learned Appellate Tribunal, then the ultimate object of introduction of the said Act will be frustrated as in all cases of such nature involving fraud at the instance of the debtors and the third party being the unlawful custodian of the hypothecated goods, such disputes are to be relegated to the regular suit for its unnecessary lengthy trial before the Civil Court.

32. Mr. Mukherjee also submitted that fraud vitiates everything and as such, a party who has committed fraud by accepting delivery of the hypothecated goods amongst other articles belonging to the admitted debtor, cannot claim that he is not amenable to the jurisdiction of Tribunal as the opposite party owed no debt in strict sense of the definition of "debt" as defined in Section 2(g) of the said Act which is not recoverable by the Bank under the said Act.

33. Mr. Jayanta Mitra, learned Senior Counsel, appearing for the opposite party No. 3 refuted the submission of Mr. Mukherjee by supporting the Judgment of the learned Appellate Tribunal.

34. Mr. Mitra interpreted the expression "debt" as defined in Section 2(g) of the said Act in the same line as it was interpreted by the learned Appellate Tribunal in the impugned Judgment.

35. Mr. Mitra contended that since there was no relationship of creditor d debtor between the Bank and, his client, the Tribunal had no jurisdiction to proceed against his client and/or to pass a decree and thereby making his client liable to pay the decretal amount to the petitioner jointly and severally.

36. Mr. Mitra further contended that his client never committed any fraud as alleged by the plaintiff/petitioner. Mr. Mitra further contended that his client intimated the Bank about the taking over of possession of the plants, machineries etc. of the opposite party No. 1 for realisation of its rental dues by sale of those plants, machineries etc.

37. According to Mr. Mitra. when the opposite party No. 3 itself by a letter intimated the Bank about the taking over of possession of the plants, machineries etc. of the opposite party No. 1, the allegation of fraud, cannot be believed.

38. Mr. Mitra ultimately submitted that when his client is not a debtor, his client cannot be made amenable to the jurisdiction of the Tribunal for realization of damages arising out of tortuous liabilities and as such, the decree which was passed against Mr. Mitra''s client by the Tribunal, is a nullity as the said decree was passed without jurisdiction.

39. In support of such submission, Mr. Mitra relied upon a decision of the Hon''ble Supreme Court in the case of Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., .

40. Mr. Mitra, thus, contended that the petitioner Bank may have some claim for damages against the opposite party No. 3 on account of tortuous liability for taking over possession of the hypothecated securities from the opposite party Nos. 1 and 2, but for realization of Bank''s such claim, provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, cannot be invoked.

41. Mr. Mitra also relied upon the following decisions to support his contention that in a suit where apart from the claim for recovery of debts due to the bank from the debtor, some other reliefs are claimed by way of damages from any person who is not a debtor, then jurisdiction of the Tribunal to try such proceeding under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is ousted:

(i) ICICI Bank Limited v. Coventry Coil-O-Matic (Haryana) Limited reported in 2005(1) CLJ Cal. 418 and

(ii) Bank of India Vs. Vijay Ramniklal Kapadia and Others, .

42. Let me now consider the respective submissions of the learned Counsel of the parties in the facts of the instant case keeping in mind the principles laid down by the Hon''ble Supreme Court in the case of Sushil Kumar Mehta (supra).

43. Admittedly there was a loan transaction between the petitioner (Bank) and the opposite party No. 1. It is also an admitted fact that the opposite party No. 2 stood as a guarantor for the said loan. It is also undisputed that the loan was secured by way of hypothecation of the plants, machineries etc. of the opposite party No. 1. Obstruction caused by all the opposite parties to the petitioner (Bank) in taking inspection of the hypothecated goods at the business place of the opposite party No. 1 remains uncontroverted. Voluntary handing over of the hypothecated securities as well as the other articles belonging to the opposite party No. 1, by the said opposite party to the opposite party No. 3, was also confirmed by the opposite party No. 3.

44. Though the opposite party No. 3 claims that the opposite party No. 3 accepted the said plants, machineries etc. from the opposite party Nos. 1 and 2 for realization of its rental dues by sale of those plants, machineries etc., but this defence, in my view, cannot be taken note of, as the said opposite party, in spite of filing written statement, did not come forward to prove its said stand in course of trial of the said proceeding.

45. That apart, hypothecation of the plants, machineries etc. of the opposite party No. 1 was also made known to the opposite party No. 3 by a letter written by the petitioner (Bank) to the said opposite party immediately after the Bank received an information that the opposite party No. 3 received delivery of the hypothecated securities and/or other articles belonging to the opposite party No. 1 from the said opposite party.

46. Thus, the only conclusion which can be arrived at by this Court is that the opposite party No. 3 intermeddled itself by colluding with the opposite party Nos. 1 and 2 in making the securities unsecured, so that the Bank is unable to realise its dues by way of enforcement of the security.

47. The relationship of creditor and debtor between the petitioner (Bank) and the opposite party Nos. 1 and 2 is admitted. Thus, realization of the debts due to the bank from the said debtors under the provisions of the said Act, cannot be disputed and in fact, has not been disputed by the opposite party No. 3 herein.

48. Now the only question before this Court, is as to whether the opposite party No. 3 who did not create any liability in the nature of debt within the strict sense of the meaning of the expression "debt" under the said Act, can be sued in a proceeding under the said Act before the Debts Recovery Tribunal or not?

49. In my view, normally the jurisdiction of the Debts Recovery Tribunal cannot be invoked for realization of any claim apart from the debt recoverable by the Bank from the debtor. But, when a person not being a debtor, intermeddled himself by entering into fraudulent and clandestine deal with the debtor to frustrate the claim of the bank against its debtor, then the relief which, in fact, is claimed against such non-debtor, is really an incidental and/or ancillary relief to the principal relief claimed against the debtor.

50. If that be so, then this Court by relying upon the decision of the Hon''ble Supreme Court in the case of United Bank of India v. Debts Recovery Tribunal (supra) can hold safely that the jurisdiction of the Tribunal is not ousted simply because certain ancillary and/or incidental relief is claimed against the non-debtor who intermeddled himself by entering into fraudulent and clandestine dealings with the admitted debtor to frustrate the speedy realization proceeding under the said Act.

51. The expressions "any liability" and "or otherwise" appearing in Section 2(g) of the said Act make it clear that any other liability which arises otherwise than in the process as specified in the said section, is also triable by the Tribunal even against the non-debtor in a suit where the principal relief is against the debtor, for realisation of the Bank''s dues. Of course, it cannot be stretched to such an extent to mean that the non-debtor can be sued independently by the Bank, before the Tribunal.

52. If this Court holds that such an ancillary and/or incidental claim against the non-debtor cannot be tried by the Tribunal in a competent proceeding initiated by the bank against its debtor for recovery of its debt, then in no case realization of bank dues by way of enforcement of security against its debtor under the said Act, will be possible as in all cases of such nature, the debtor will hand over the secured and/or unsecured securities to a third person to frustrate the speedy realization process and the Bank will be forced to follow the lengthy proceeding for such

realization before the Civil Court.

53. That apart, fraud cannot be the basis for ouster of jurisdiction of a Tribunal which was constituted under the Act of Parliament with the reason and object of speedy recovery of dues by the bank from its debtor. In my view, such a narrow interpretation of the expression "debt" will ultimately destroy the object and reason of enactment of such Act.

54. The decisions which were cited by Mr. Mitra, in my view, have no application in the facts of the instant case, as in either of the said decisions, i.e. in the case of ICICI Bank Limited (supra) or in the case of Bank of India v. Vijay Ramniklal Kapadia (supra), it was not held that if in a suit for recovery of dues arising out of debt by bank against the debtor any incidental relief is claimed against the non-debtor, then the jurisdiction of the Tribunal to consider the claim against the non-debtor is ousted.

55. On perusal of the decision in the case of ICICI Bank Limited (supra), this Court finds that, that was a suit for declaration and specific performance of contract and not one for recovery of a debt. As such, it was rightly pointed out by this Hon''ble Court in the said decision that the Tribunal has no jurisdiction to try such a dispute under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

56. Similarly, in the other decision in Bank of India v. Vijay Ramniklal Kapadia (supra), this Court finds that, that was a suit for realization of money from one of its employees who misappropriated certain amount by committing fraud upon the Bank. Such a suit being essentially not a suit for recovery of debt is no doubt not maintainable before the, Tribunal under the said Act.

57. In my view, the ratio which was laid down in the aforesaid decisions has no application in the facts of the instant case, as there is no identity and/or similarity of facts involved in those cases with the facts of the instant case.

58. In such view of the matter, this Court has no hesitation to hold that the learned Appellate Tribunal acted illegally by holding that the decree passed against the defendant/opposite party No. 3 is illegal.

59. The Judgment and order passed by the learned Appellate Tribunal, thus, stands set aside.

The Judgment and order passed by the learned Debts Recovery Tribunal, Calcutta is, thus, restored.

The revisional application, thus, stands allowed.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties, as expeditiously as possible.