

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

WA.No. 1797 of 2009 () IN WP(C).22192/2007

AGAINST THE ORDER/JUDGMENT IN WP(C) 22192/2007 of HIGH COURT OF
KERALA DATED 02-04-2009

APPELLANT/PETITIONER:

K.P.JAYAN,
KONACKAL HOUSE, EDATHALA,
ALUVA VILLAGE, ERNAKULAM-683561

BY ADV. SRI.DINESH R.SHENOY

RESPONDENTS/RESPONDENTS:

1. HONG KONG & SHANGHAI BANKING CORPORATION LTD.
P.O.BOX NO.224, VELLANGALLOOR,
THIRUVANANTHAPURAM 695 010
2. THE AUTHORISED OFFICER (UNDER CETNRL ACT 54/02)
THE HONG KONG & SHNGHAI BANKING CORPORATION LTD.,
39/6765, HARBOUR VIEW RESIDENCY,
OPP. SHIPYARD, M.G.ROAD, COCHIN-682 015
3. V.P.SUNITHA RAGHU, PANJAVADI APARTMENTS,
AMBELIPADAM ROAD, VYTTLA,
KOCHI- 19
4. THE MANAGER,
UCO BANK LTD., FORT KOCHI

R,R4 BY ADV. SRI.GEORGE KARITHANAM VARGHESE
R,R4 BY ADV. SRI.V.J.JOHN
R,R4 BY ADV. SRI.C.I.ABRAHAM
R,R4 BY ADV. SRI.JOSE KURIAKOSE (VILANGATTIL)
R BY SRI.VARGHESE.C.KURIAKOSE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 31-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

**ANTONY DOMINIC &
P.V.ASHA, JJ.**

W.A.No.1797 of 2009

Dated this the 31st day of August, 2015

JUDGMENT

The petitioner in W.P.(C) No.22192 of 2007 is the appellant. The writ petition was filed challenging Ext.P1 order passed by the Debt Recovery Tribunal, Ernakulam in I.A.No.2089 of 2006 in S.A.No.77 of 2006, whereby the Tribunal dismissed Ext.P12 application filed by the appellant seeking condonation of delay of 554 days in filing Ext.P11 application under section 17 of the SARFAESI Act. In the order impugned, the Tribunal held that section 5 of the Limitation Act does not apply to an application filed under section 17(1) of the SARFAESI Act. In the judgment under the appeal, the learned single Judge upheld the legality of the said order and it is this judgment which is under challenge before us. We heard the learned counsel for the appellant, the learned standing counsel for the fourth respondent and considered the submissions made.

2. On facts, it is relevant to note that mortgaging plot of landed property, the appellant had availed a housing loan from

the first respondent bank. Default was committed and that lead to initiation of proceedings under the SARFAESI Act. Finally sale notice was issued and at that stage the appellant filed O.S.No.880 of 2005 before the Principal Munsiff's Court, Ernakulam. That suit was subsequently dismissed for default, though the date of dismissal is not seen disclosed in the pleadings. It is also seen that I.A.Nos.4816 of 2013 and 4817 of 2013 seeking restoration of the suit and condonation of delay in making the application are pending consideration of the trial court. Though the details thereof are also not available proceedings under the SARFAESI Act continued and on 20.12.2005 the secured asset was sold by the bank and was purchased by the third respondent.

3. In so far as the fourth respondent, who is impleaded in the appeal, is concerned, it is stated that after purchasing the property, the third respondent mortgaged the property with the fourth respondent. It is also stated that following the defaults committed by the third respondent, proceedings under the SARFAESI Act were initiated by the fourth respondent and that

challenge against such proceedings are also pending consideration of the Debt Recovery Tribunal, the details of which are unnecessary for the disposal of this appeal.

4. It is stated that aggrieved by the sale of the property held on 20.12.2005, the appellant moved the All India Legal Services Cell of the Honourable Supreme Court which was forwarded to the Kerala State Legal Services Authority. Those proceedings were closed on 7.11.2006. Subsequently on 11.12.2006, the appellant filed Ext.P11, S.A.No.77 of 2006, under section 17 of the SARFAESI Act before the DRT, along with Ext.P12, I.A.No.2089 of 2006, seeking condonation of delay of 554 days in filing Ext.P11. It was this I.A.which was dismissed by the DRT as per Ext.P1 order holding that section 5 of the Limitation Act is inapplicable to an application under section 17 of the SARFAESI Act filed before the Tribunal.

5. The learned counsel for the appellant referred us to section 19 and 24 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act for short) and sections 2(1), 17 and 18 of the SARFAESI Act to contend that the

Limitation Act is applicable to a proceedings under section 17 and that therefore the conclusion of the Tribunal confirmed by the learned single Judge is illegal. The counsel also relied on the judgment of the Apex Court in **Baleshwar Dayal Jaiswal V. Bank of India** [2015 (3) KLT 652] to substantiate his contention. It was also contended that the Debt Recovery Tribunal is a court and therefore also the provisions of the Limitation Act are applicable. Lastly, he contended that in Ext.P12 application, condonation of delay was sought under section 14 of the Limitation Act due to bonafide prosecution of civil suit and before the KELSA. According to him on that ground also the appellant was entitled to have a favourable order on Ext.P12 application. All these contentions were contradicted by the learned counsel appearing for the respondent bank.

6. We have considered the submissions made. In so far as section 19 of the RDB Act is concerned, the bank or a financial institution is authorised to make application to the Tribunal for recovery of its dues. Section 20 provides for appeals to the appellate Tribunal. Section 24 of this Act provides that the

provisions of the Limitation Act, 1963, shall, as far as may be, apply to an application made to a Tribunal. Turning to the provisions of the SARFAESI Act as per section 2(i) the Debt Recovery Tribunal means the Tribunal established under section 3(1) of the RDB Act. Section 17 provides that any person including a borrower aggrieved by any of the measures referred to in section 13(4) taken by the secured creditor or his authorised officer may make an application to the DRT within 45 days from the date such measures had been taken. Section 18 provides that any person aggrieved by any order made by the DRT under section 17 may prefer an appeal to the Appellate Tribunal within 30 days.

7. Referring to these provisions the contention urged before us is that since section 24 of the RDB Act makes Limitation Act applicable and as the DRT constituted under the RDB Act is conferred with jurisdiction under section 17, Limitation Act governs applications made in a proceedings under section 17 also. We are unable to accept this contention. Both the RDB Act and the SARFAESI Act are independent enactments, although

certain provisions of the RDB Act are made applicable in respect of the proceedings under the SARFAESI Act also. However that does not mean that every provision of the RDB Act would apply to every proceedings initiated under the SARFAESI Act. In so far as this case is concerned, proceedings were initiated under SARFAESI Act and in view of the provisions contained in section 17 conferring jurisdiction on the DRT constituted under RDB Act application is made by the appellant before the DRT. That does not mean that provisions of section 24 of the RDB Act governing the proceedings taken thereunder would get automatically attracted to such proceedings before the DRT. Therefore the contention raised relying on section 24 in so far as this case is concerned is only to be rejected and we do so. This is further clear from section 36 of the SARFAESI Act, which confines the applicability of the Limitation Act to measures under section 13 (4) of the said Act.

8. In so far as the decision of the Supreme Court in ***Baleshwar Dayal Jaiswal V. Bank of India*** [2015 (3) KLT 652] is concerned, a reading of paragraph 1 of the judgment

shows that the question that was considered by the Apex Court was whether the Appellate Tribunal under the SARFAESI Act has power to condone delay in filing an appeal under section 18(1) of the said Act. This question was answered by the Apex Court in paragraph 8 of the judgment thus:

8. The first point for consideration is the applicability of proviso to S.20(3) of the R.D.B. Act to the disposal of an appeal by the Appellate Tribunal under S.18(2) of the SARFAESI Act. A bare perusal of the said S. 18(2) makes it clear that the Appellate Tribunal under the SARFAESI Act has to dispose of an appeal in accordance with the provisions of the R.D.B. Act. In this respect, the provisions of the R.D.B. Act stand incorporated in the SARFAESI Act for disposal of an appeal. Once it is so, we are unable to discern any reason as to why the SARFAESI Appellate Tribunal cannot entertain an appeal beyond the prescribed period even on being satisfied that there is sufficient cause for not filing such appeal within that period. Even if power of condonation of delay by virtue of S.29(2) of the Limitation Act were held not to be applicable, the proviso to S.20(3) of the R.D.B. Act is applicable by virtue of S. 18(2) of the SARFAESI Act. This interpretation is clearly borne out from the provisions of the two statutes and also advances the cause of justice. Unless the scheme of the statute expressly excludes the power of condonation there is no reason to deny such power to a Appellate Tribunal when the statutory scheme s»o 'warrants. Principle of legislation by

incorporation is well known and has been applied inter alia in Ram Kirpal Bhagat v. The State of Bihar ((1969) 3 SCC 471), Bolani Ores Ltd. v. State of Orissa ((1974) 2 SCC 777), Mahindra and Mahindra Ltd. v. Union of India ((1979) 2 SCC 529) and Onkarlal Nandlal v. State of Rajasthan ((1985) 4 SCC 404) relied upon on behalf of the appellants. We have thus no hesitation in holding that the Appellate Tribunal under the SARFAESI Act has the power to condone the delay in filing an appeal before it by virtue of S. 18(2) SARFAESI Act and proviso to S.20(3) of the R.D.B. Act.

9. Reading of paragraph 8 shows that Apex Court has held that the Appellate Tribunal functioning under section 18 of the Act has power to condone delay relying on section 18(2) which provides that the Tribunal shall dispose of the appeal in accordance with the provisions of the RDB Act and rules made thereunder. Thereafter the court has made reference to section 20 of the RDB Act, subsection 3 of which, though provides that the appeal is to be filed within 45 days, the appellate Tribunal may entertain an appeal after the expiry of said period of 45 days, if it is satisfied that there was sufficient cause for not filing it within that period. Therefore the provisions that were considered by the Apex Court in the above judgment are the

provisions conferring appellate power on the Appellate Tribunal constituted under the SARFAESI Act and the RDB Act. Similar power to condone delay is not conferred on the Debt Recovery Tribunal exercising power under section 17 of the SARFAESI Act or the Tribunal exercising power under section 19 of the RDB Act. Therefore the judgment of the Apex Court relied on is not an authority for the proposition that the Debt Recovery Tribunal can consider an application for condonation of delay under section 5 of the Limitation Act in an application under section 17 of the SARFAESI Act.

10. The other contention raised by the counsel for the appellant is that the Tribunal is a court and therefore the Limitation Act in its entirety is applicable. We are unable to accept that contention and according to us this issue is already concluded against the Appellate Tribunal in view of the judgment of the Apex Court in ***Birla Cement Works V. G.M. Western Railways and Another*** [AIR 1995 SC 1111] where the Railway Claims Tribunal has been held to be a Tribunal and also the judgment of the Apex Court in ***Transcore V. Union of India***

and Another [2007 BC 33 (SC)] where the Apex Court has held that the Debt Recovery Tribunal is a Tribunal, that it is a creature of the statute and that it has no inherent power which exists in civil courts.

11. The last contention of the appellant was that in Ext.P12 application the prayer for condonation was sought under section 14 of the Limitation Act and that the same was not considered. Section 14 of the Limitation Act provides for exclusion of time of proceedings bonafide in court without jurisdiction. Section 14(1) and (2) read thus:

14. Exclusion of time of proceeding bona fide in court without jurisdiction.— (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

2. In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil

proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

12. In so far this case is concerned, even if it assumed that the appellant can legitimately claim the benefit of section 14, on facts, we are unable to accept it. We have already stated that O.S.No.880 of 2005 filed before the Principal Munsiff's Court was dismissed for default. Though application for its restoration along with an application for condonation of delay filed was in 2013, it is pending. In the absence of materials we do not know the extent of the period that could be excluded taking advantage of filing of the suit relying on section 14. Secondly the appellant himself says that proceedings were pending before the Kerala State Legal Services Authority and that the same were closed on 7.11.2006. These proceedings cannot by any stretch of imagination come within the purview of section 14 of the Limitation Act. In such circumstances, this vague claim of the appellant cannot be accepted.

W.A.No.1797 of 2009

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For all these reasons, we do not find any merit in this appeal.

Appeal fails and is accordingly dismissed.

Sd/-

**ANTONY DOMINIC,
JUDGE.**

Sd/-

**P.V.ASHA,
JUDGE.**

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