

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2533 OF 2014**

M/s. Deluxe Cotton Corporation and ors. .. Petitioners.

vs.

Bank of Baroda .. Respondent.

Mr. Sharan Jagtiani a/w. Ms Sheetal Shah i/b Mehta & Girdharlal
for the petitioners.

Mr. Nasikwala a/w. Ms Gaurangi Pujara, Utsav Ghosh i/b Little
and Co. for respondent-bank.

**CORAM: D.H. WAGHELA, C.J. AND
M.S.SONAK, J.**

DATE : 18 MARCH 2016.

ORAL JUDGMENT : (Per : M. S. SONAK, J.)

1] The question which arises in this petition is whether the provisions relating to pre-deposit contained in section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (said Act) are attracted at the stage of consideration of an application for condonation of delay in the institution of an appeal under section 20 of the said Act?

2] The challenge in this petition is to the order dated 14 July 2014 made by the Debt Recovery Appellate Tribunal (DRAT), Mumbai refusing to condone the delay of 1009 days on the part of the petitioners in instituting appeal against the order dated 19 November 2013 made by the Presiding Officer, Debt Recovery Tribunal (DRT) in O.A. No. 2494 of 1999.

3] Mr. Jagtiani, learned counsel for the petitioners, by reference to provisions contained in sections 20 and 21 of the said Act has contended that the bar under section 21 of the said Act is to the '*entertainment of the appeal*' by DRAT. He submitted that only after the delay in the institution of appeal is condoned, does the stage for entertainment of appeal arises. He submitted that an order, either condoning or refusing to condone the delay, is not an order in appeal itself and therefore, there is no question of the applicability of the provisions contained in section 21 of the said Act, at the stage of deciding an application for condonation of delay in institution of an appeal under section 20 of the said Act. In this regard, Mr. Jagtiani placed reliance upon the decision of learned Single Judge of the Madhya Pradesh High Court in *Chhitu Vs. Mathuralal and ors*¹, decision of the Division Bench of the Madras High Court in *M/s. Kasturi & Company and ors. Vs. The Manager, Tamil Nadu Mercantile Bank and ors.*² and the decision of the Division Bench of this Court in *Dwarkadish Sakhar Karkhana Ltd. Vs. Commr. Of Central Excise*³.

4] Mr. Jagtiani, further submitted that the delay in institution of the appeal in the present case was of hardly 26 days and not 1009 days as held by DRAT. Mr. Jagtiani submitted that after suit no. 1353 of 1998 instituted by the respondent bank was transferred to DRT, for a period of almost two to three years, the

1 AIR 1981 Madhya Pradesh 13

2 Writ Petition No. 29177 of 2013 decided on 29.10.2013

3 2014 (308) ELT 47 (Bom.)

respondent-bank took no steps to serve proper notices upon the petitioners. The DRT's order dated 19 November 2003 was made *ex-parte* and the petitioners acquired knowledge of the same only upon being served with attachment warrant by the Recovery Officer on or about 18 August 2006. The appeal was instituted by the petitioners soon thereafter and the delay if construed from the date of knowledge, is of hardly 26 days, for which, sufficient cause has been duly shown. For all these reasons, Mr. Jagtiani submitted that the impugned order may be set aside and DRAT be directed to hear the petitioners' appeal against *ex-parte* order dated 19 November 2003 on merits.

5] In order to determine whether the provisions of section 21 of the said Act are attracted even at the stage of consideration of an application seeking condonation of delay in institution of an appeal before DRAT, brief reference is necessary to the provisions contained in sections 20 and 21 of the said Act for the purposes of appreciating their import in the context of the question raised.

6] Sub-section (1) of section 20 of the said Act provides that save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under the said Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter. Sub-section (3) of section 20 of the said Act provides that every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which

a copy of the order made, or deemed to have been made, by the Tribunal, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed. The proviso to this sub-section provides that the Appellate Tribunal may entertain an appeal after expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

7] Section 21 of the said Act, reads thus :

“21. Deposit of amount of debt due, on filing appeal.- *Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19:*

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.”

8] The provisions contained in section 21 do not apply to all types of appeals contemplated under section 20 of the said Act. The provisions contained in section 21 apply only where an appeal is preferred ‘*by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions.*’ There is a statutory bar to the entertainment of appeal instituted by such a person, unless, such a person has deposited with DRAT 75% of the amount of debt so due from him

as determined by the Tribunal under section 19 of the said Act. The proviso to said section empowers the DRAT to, for reasons to be recorded in writing, waive or reduce the amount to be deposited under section 21 of the said Act.

9] As rightly contended by Mr. Jagtiani, the bar contained, in section 21 of the said Act is to the '*entertainment of the appeal*'. The question therefore arises is whether an appeal instituted by a person referred to in section 21 of the said Act, when accompanied by an application for condonation of delay in filing the appeal, is at all '*an appeal in the eyes of law*', in order that the bar, as contained in section 21 of the said Act, is attracted.

10] At the very outset, we must note that we have perused the decisions, upon which reliance was placed by Mr. Jagtiani and we find that such issue neither arose for consideration, nor was the same decided by the Division Benches of this Court and the Madras High Court in *Dwarkadish Sakhar Karkhana Ltd.* (supra) *and M/s. Kasturi and Company* (supra). It must be noted upon the authority of the decision of the House of Lords in *Quinn vs. Leatham*⁴ that a judgment is authority for the proposition, which it decides and not what can be deduced therefrom. This principle has been accepted by the Hon'ble Supreme Court in *Arasmeta Captive Power Company Private Limited vs. Lofarge India Private Limited*.⁵, *Ambica Quarry*

4 1901 AC 495

5 (2013) 15 SCC 414

*Works vs. State of Gujarat and ors.*⁶ and *Laxmi Devi vs. State of Bihar and ors.*⁷. Further, as held by the Hon'ble Supreme Court in *Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut*⁸, a judgment is not a precedent on a proposition which it did not decide. Therefore, the decisions in the said cases offer no assistance to the proposition advanced by Mr. Jagtiani.

11] The decision in *Chhitu* (supra) delivered by learned Single Judge of the Madhya Pradesh, does, to a certain extent, support the proposition advanced by Mr. Jagtiani that unless delay is condoned, there is no occasion for entertainment of an appeal. However, with respect, we are unable to subscribe to the view taken in the said decision, as, we are of the opinion that the view taken therein is in direct conflict with the decisions of the Hon'ble Supreme Court and this Court on the subject.

12] The question as to whether an appeal accompanied by an application for condoning the delay in filing the appeal, is at all an appeal in the eyes of law, arose for consideration in *Shyam Sundar Sarma vs. Pannalal Jaiswal and ors.*⁹ Upon analysis of several decisions on the subject, the Hon'ble Supreme Court has, in no uncertain terms, held that an appeal accompanied by an application for condoning delay in filing the appeal, is

6 (1987) 1 SCC 213

7 (2015) 10 SCC 241

8 1997 (1) SCC 203

9 (2005) 1 SCC 436

nevertheless an appeal in the eyes of law and when the application for condoning delay in filing the appeal is dismissed and consequently the appeal itself is dismissed as being time barred by limitation, such a dismissal order, is one made in the appeal itself. In paragraph 8, the Hon'ble Supreme Court has approved the decision of Privy Council in ***Nagendra Nath Dey vs. Suresh Chandra Dey***¹⁰, in which, it is observed thus :

“There is no definition of appeal in the Civil Procedure Code, but Their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.”

[emphasis supplied]

13] In ***Mela Ram and Sons Vs. CIT***¹¹, the Hon'ble Supreme Court held that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in an appeal. The Hon'ble Supreme Court not only followed the view taken by the Privy Council, ***Nagendra Nath Dey (supra)*** but also quoted with approval the observations of Chagla, C.J. in ***K.K. Porbunderwalla v. CIT***¹² to the following effect :

“[A]lthough the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income Tax

¹⁰ AIR 1932 PC 165

¹¹ AIR 1956 SC 367

¹² (1952) 21 ITR 63 (Bom)

Officer.”

14] Again, in *Sheodan Singh Vs. Daryo Kunwar*¹³, rendered by four Judges of the Hon'ble Supreme Court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. The Court held that :

“We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.”

[emphasis supplied]

15] The question was considered in extenso by a Full Bench of the Kerala High Court in *Thambi v. Mathew*¹⁴. Therein, after referring to the relevant decisions on the question, it was held that an appeal presented out of time was nevertheless an appeal in the eye of the law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation,

¹³ AIR 1966 SC 1332

¹⁴ (1987) 2 KLT 848 (FB)

after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against.

16] Thus, the position that emerges upon a survey of the authorities is that an appeal filed along with an application for condonation of delay in filing that appeal, is nevertheless an appeal in the eyes of law. Accordingly, such appeal, when dismissed upon refusal to condone the delay, is nevertheless, a dismissal of the appeal itself. Such dismissal, confirms the order appealed against and therefore, amounts to disposal of the entire appeal itself. As a corollary therefore, the appeal court, at the stage when it is considering the application for condonation of delay in institution of the appeal, is also, '*entertaining the appeal*' itself. The bar under section 21 of the said Act will therefore, apply even at the stage of consideration of the application for condonation of delay accompanying an appeal under section 20 of the said Act.

17] We therefore hold that an appeal accompanied by an application for condonation of delay in filing the appeal, is nevertheless, an appeal in the eyes of law and the order, dismissing the application for condonation of delay in filing the appeal, is nevertheless, a decision in the appeal itself. Section 21 of the said Act, as noted earlier, in peremptory terms provides that an appeal instituted by a person from whom the amount of debt is due to a bank shall not be entertained by the Appellate Tribunal

unless such person has deposited with the Appellate Tribunal 75% per cent. of the amount of debt so due from him as determined by the Tribunal under section 19 of the said Act. No doubt, the proviso to section 21 empowers the Appellate Tribunal, for reasons to be recorded in writing, to waive or reduce the amount to be deposited under section 21 of the said Act. Therefore, until such person deposits the amount prescribed or secures a waiver or reduction under the proviso, there is no question of Appellate Tribunal entertaining the appeal under section 21. In view of the legal position discussed earlier, an appeal accompanied by an application for condoning the delay in filing the appeal, is itself an application in the appeal for the purposes of section 20 of the said Act. Accordingly, unless the predicates on section 21 of the said Act were complied with, there was no question of DRAT even entertaining the appeal or application for condonation of delay in filing the appeal.

18] That apart, we are satisfied that in the present case, the delay of 1009 days in filing the appeal was inordinate and in the absence of sufficient cause being shown by the petitioners, the DRAT was justified in not entertaining the appeal. There is no merit in the contention of Mr. Jagtiani that the delay in the present case was of only 26 days. The delay was of 1009 days and there was no sufficient cause shown for the condonation of the same.

19] The petitioners, in the present case, had appeared

before this Court and filed written statement in Suit No. 1353 of 1988, which was eventually transferred to the DRT. The material on record establishes that the counsel for the respondent-bank did attempt to serve notice upon counsel for the petitioners once the suit was transferred to the DRT, but the counsel for the petitioners refused to accept such notice. The respondent-bank, thereafter served a written notice to the petitioner, which was again refused by the petitioners. The same was the fate of the notice issued by way of R.P.A.D. Finally, the petitioners were served by way of publication. The petitioners, however, refused to take part in the proceedings before DRT, which finally made order dated 19 November 2003, which the petitioners now choose to style as an *ex-parte* order.

20] If the petitioners were indeed serious in contending that the order dated 19 November 2003 made by DRT was an '*ex-parte order*', the petitioners would have surely approached DRT with an application for setting aside such *ex-parte* order. In terms of section 22 (2)(g), DRT has been vested with the powers for setting aside any order of dismissal of any application for default or any order passed by it *ex-parte*. There was, in such a situation, no necessity of instituting any appeal to DRT in terms of section 20 of the said Act. However, the petitioners, chose to institute an appeal under section 20 of the said Act to DRAT after delay of about 1009 days and desired adjudication upon the same, even without compliance with the provisions prescribed under section 21 of the said Act.

21] In terms of section 20(3) of the said Act, every appeal under sub section (1) of section 20 of the said Act has to be filed within a period of 45 days from the date on which a copy of the order made or deemed to have been made, by DRT is received by him and it shall be in such form and be accompanied by such fee as may be prescribed. DRAT may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.

22] In this case, after DRT made its order dated 19 November 2003, the respondent bank intimated the petitioners about the making of such order by address of written notices. The notices were however returned with the remark '*unclaimed*'. The respondent bank, thereupon, published notice in the newspapers on 15 September 2004. The petitioners, however, ignored such intimations and notices, but claimed to have obtained knowledge about DRT's order dated 19 November 2003, only after they were served with the warrant of attachment. The petitioners cannot, in such a manner, take advantage of their own negligence or seek indulgence by way of condonation of delay.

23] We are satisfied that the petitioners had virtually abandoned the proceedings after same were transferred to the DRT. The petitioners did not bother to make any enquiries as to the progress of proceedings or make any attempts to find out whether the proceedings have been concluded. In such

circumstances, the petitioners cannot purport to reckon the period of limitation from the date of alleged knowledge and on the said basis claim that the delay in the institution of appeal is of only 26 days. The DRAT has correctly appreciated the facts and circumstances as borne out of the records and has rightly refused to condone such inordinate delay. There is neither any jurisdictional error nor any legal infirmity in making the impugned order.

24] In the facts and circumstances of the present case, there is really no explanation as to why the petitioners stopped participating in the proceedings before the DRT and thereafter, chose to make no enquiry whatsoever with regard to the orders made by the DRT in the said proceedings. The petitioners, obviously, cannot draw some mileage from out of their own negligence. The Hon'ble Supreme Court in *Madhya Pradesh Matsya Mahasangh Vs. Sudheer Kumar and another*¹⁵, upheld orders declining to condone delay of about 948 days, when it was established that the applicant being aware of the proceedings consciously chose not to participate in them and the cause shown for the delay was wholly inadequate and unsatisfactory, bordering on suppression and misrepresentation of facts.

25] In order to test the *bona fides* of the petitioners, we had made a query to the learned counsel for the petitioners as to whether petitioners are willing to deposit the amount as

15 (2010) 15 SCC 179

determined by the DRT before the DRAT. Mr. Jagtiani, on the basis of instructions from the petitioners, candidly stated that the petitioners will not deposit any amounts. No doubt, Mr. Jagtiani did make submission to the effect that the respondent-bank had withheld certain fixed deposits and further, the respondent-bank has failed to give credit to the petitioners for certain amounts deposited in the past and if the same are taken into consideration, there may be no requirement for deposit of any amounts. From the amounts stated, however, we are satisfied that the petitioners would be required to deposit substantial amounts in terms of the order made by the DRT. It was quite apparent therefore that the petitioners were not willing to make any deposits.

26] The proceedings against the petitioners commenced before DRT at least in the year 1999 and were disposed of by DRT's order dated 19 November 2013. After the petitioners were served with warrant of attachment by way of execution, the petitioners, instituted appeal before DRAT along with application seeking condonation of delay. The delay, as we have noted earlier, was of about 1009 days, though, the petitioners, without any basis, have urged that the delay was of only 26 days. The application for condonation of delay and consequently, the appeal, came to be dismissed by the impugned order dated 14 July 2014. Thus, the petitioners, have successfully dragged the proceedings for about 15 years, thereby frustrating the very purpose for enactment of the said Act.

27] In **Standard Chartered Bank vs. Dharminder Bhohi & Ors.**¹⁶ the Hon'ble Supreme Court, in the context of delay in disposal of applications by DRT's and DRAT's, at paragraph 1 has observed thus :

“Leave granted. The present appeal depicts a factual score where this Court is constrained to say that delay in disposal of the application by the Debts Recovery Tribunal and the appeal by the Debts Recovery Appellate Tribunal have the effect potentiality of creating corrosion in the economic spine of the country. It exposit a factual expose which is not only perplexing but ushers in a sense of puzzlement which in the ultimate eventuate compels one to ask: “How long can the financial institutions suffer such procrastination? How far the public interest be put to hazard because of small, and sometimes contrived individual interest? To what extent the defaulters be given protection in the name of balancing the stringent powers vested in the banks and the statutory safeguards prescribed in favour of loanees? Even assuming there are legal lapses and abuses, how long the statutory tribunals take to put the controversy to rest being oblivious of the fact that the concept of flexibility is insegregably associated with valuation of any asset? One is bound to give a wake-up call and we so do by saying “Tasmat Uttistha Kaunteya”, “Awake, Arise, 'O' Partha.”

28] In the aforesaid decision, the Hon'ble Supreme Court has emphasised the necessity of speedy disposal of matters by DRT and DRAT as such speedy disposal is the fundamental object of the said Act and 'time factor' has inextricable nexus with the sustenance of economy. In the same judgment, the Hon'ble Supreme Court has explained that the purpose of enacting section

¹⁶ (2013) 15 SCC 341

22 in the said Act, was to ensure that the DRT and DRAT are not bogged down by undue procedural restraints, stalling the speedy disposal of such matters.

29] For all the aforesaid reasons, we dismiss this petition with costs quantified at Rs.10,000/- (Rupees Ten Thousand). The costs to be paid to the respondent within a period of four weeks from today.

(CHIEF JUSTICE)

(M.S. SONAK, J.)