

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO. 346 OF 2016**

Harvestdeal Securities Ltd.	..	Petitioner
versus		
Punjab National Bank	..	Respondent

Mr. Chirag Mody with Mr. Jayesh Mestry i/b. RMG Law Associates for petitioner.

Ms Jinal Gogri with Mr. Vikrant Makhare with Ms Rutuja Patil i/b. Negandhi, Shah & Himayatullah for respondent.

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

DATE : 8 MARCH 2016

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

1] By this petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged order dated 19 February 2015 made by the Debt Recovery Appellate Tribunal (DRAT).

2] In this case, the respondent – Punjab National Bank (PNB) has instituted Original Application No. 100 of 2005 under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDDB) with the Debt Recovery Tribunal (DRT), Mumbai seeking recovery of an amount of Rs.94,36,041/- on basis of certain transactions, with which, we are not presently concerned.

3] On 7 March 2006, the petitioner filed detailed written statement,

urging *inter alia* that the claim of PNB is barred by limitation, untenable on merits and in any case settled. After setting out their entire defence on merits, in paragraph 30 of the written statement, the petitioner also pleaded that the claim of PNB is not maintainable owing to the arbitration clause between the petitioner and the PNB, due to which, the Stock Exchange Mumbai Arbitration Forum, will have jurisdiction to try and decide the Original Application.

4] The DRT, by cryptic order dated 9 September 2009, at a stage when the matter was posted for final arguments, entertained the preliminary objection raised by the petitioner and has held that the parties are required to be referred to arbitration, as envisaged in the contract note. On this basis, the DRT granted leave to PNB to withdraw Original Application No. 100 of 2005 and to submit the disputes to arbitration as envisaged in the contract note.

5] The PNB instituted Appeal No. 310 of 2009 before the DRAT, which has, by the impugned order dated 19 February 2015, allowed the appeal, set aside the DRT's order dated 9 September 2009 and remitted the matter to the DRT for determining the liability of the petitioner. Further, the DRAT after taking cognizance of the circumstances that the claim of PNB for an amount of Rs.94,36,041/- against the petitioner is pending since 27 February 1999, the petitioner have been directed to deposit a sum of Rs.10,00,000/- before the DRT, Mumbai, in order to show their *bona fides*.

6] Mr.Chirag Mody, learned counsel for the petitioner by relying upon the decision of the Hon'ble Apex Court in the case of ***Ardy International (P) Ltd. & Anr. vs. Inspiration Clothes & U & Anr.***¹ has

¹ (2006) 1 SCC 417

submitted that the jurisdiction of the DRT was barred in view of the arbitration clause contained in the contract notes exchanged between the parties and the cognizance of such arbitration clause could always have been taken note of by the DRT, even *suo motu*. Mr. Mody submitted that in any case, the direction to the petitioner to deposit a sum of Rs.10,00,000/- before the DRT, Mumbai, was clearly in excess of jurisdiction and the DRAT was not at all justified in making the same in the appeal instituted by PNB. For these reasons, Mr. Mody submitted that the impugned order dated 19 February 2015 warrants interference under Articles 226 and 227 of the Constitution of India.

7] Ms Jinal Gogri, learned counsel for the respondent Bank submitted that the view taken by the DRT in its order dated 9 September 2009 was patently unsustainable, being contrary to the provisions contained in section 8 of the Arbitration and Conciliation Act, 1996 (1996 Act) as also, several decisions, which categorically provide that the party objecting to the continuance of proceedings before a judicial authority must, not later than when submitting his first statement on the substance of the dispute, make a written application before the judicial authority, enclosing along with the original arbitration agreement or duly certified copy thereof. She submitted that in this case no such application was ever made by the petitioner, rather, the petitioner proceeded to file written statement in the matter, thereby, waiving the right, if any, to seek reference to the dispute to arbitration. Ms Gogri has submitted that the entire objective of the petitioner was to protract the proceedings before the DRT and it is for this purpose that the preliminary objection was raised at a stage when the matter was taken up by the DRT for final arguments. She submitted that on the basis of such objection, the petitioner has delayed the proceedings in Original Application No. 100 of 2005, for over a decade. Taking into

consideration such conduct of the petitioner, Ms Gogri submitted that the DRAT has rightly directed the petitioner to deposit amount of Rs.10,00,000/-, as against the claims of Rs.94,36,041/- due since the year 1999. Ms Gogri submitted that the petitioner, has abused the judicial process and this is therefore, a fit case to dismiss this petition with exemplary costs.

8] Rival contentions now fall for our determination.

9] In this case, we are satisfied that the DRT's order dated 9 September 2009 was contrary to the provisions contained in section 8 of the 1996 Act (as it was then applicable) as well as several decisions holding the filed that reference in terms of section 8 of the 1996 Act cannot be made unless, the predicates prescribed under the said section are fulfilled by the party seeking such reference. The DRAT was quite right in making the impugned order dated 19 February 2015 and setting aside the DRT's order dated 9 September 2009. There is no legal infirmity in the impugned order dated 19 February 2015 made by the DRAT.

10] In this regard, reference to section 8 of the 1996 Act is necessary. The same reads thus :

"8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original

arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

[emphasis supplied]

11] In the present case, PNB instituted Original Application No. 100 of 2005 before the DRT on or about 12 June 2003 claiming an amount of Rs.94,36,041/- from the petitioner. The petitioner, after almost three years, filed a detailed written statement, raising several disputes on merits. Therein, the petitioner has objected to the claim of PNB by disputing liability to pay, by claiming settlement of accounts, by claiming that the claim is barred by limitation and so on. In paragraph 30 of the written statement, the petitioner has also objected to the maintainability of the original application owing to the arbitration clause between the petitioner and PNB. The perusal of the written statement leaves no manner of doubt that the same constitutes '*first statement on the substance of the dispute*' as expressed in section 8(1) of the 1996 Act. Even Mr. Mody, learned counsel for the petitioner, did not dispute that the written statement filed by the petitioner on 7 March 2006 constitutes the first statement on the substance of the dispute. There is no record of the petitioner, during the period between 12 June 2003 i.e. the date of institution of the original application and 7 March 2006 i.e. the date of filing a written statement, having made any written application before the DRT accompanied by the original arbitration agreement or a duly certified copy thereof before the DRT, urging reference to arbitration. Even this position, was not disputed at the bar.

12] In view of the aforesaid factual position, the DRT exceeded

jurisdiction and in any case, was not at all justified in making the order dated 9 September 2009 and granting leave to PNB to withdraw original application No. 100 of 2005 and to submit the disputes to arbitration. The DRT, was not at all justified in making such order at the stage when the matter before the DRT was posted for final hearing. At that stage, the DRT after taking into consideration significant circumstance that the petitioner had at no stage made any written application as contemplated by section 8 of the 1996 Act, and further, taken part in the proceedings before the DRT by filing written statement on 7 March 2006 and even thereafter, had no jurisdiction to entertain the oral plea made by the learned counsel for the petitioner that preliminary objection be decided and on the said basis the parties be referred to arbitration. The DRAT in such circumstances was entirely justified in making the impugned order dated 19 February 2015 and setting aside the DRT's order dated 9 September 2009.

13] The circumstances in which the judicial authority can refer the parties to arbitration in terms of section 8 of the 1996 Act are subject-matter of several decisions, both of the Hon'ble Supreme Court as well as this Court. Reference to some of them would be apposite, particularly, as we are satisfied that the petitioner has abused the process of the court by insisting upon reference to arbitration, without complying with the predicates of section 8 of the 1996 Act, only with a view to derail the proceedings before the DRT, which were at the stage of final hearing in the year 2009. By this, the petitioner has succeeded in delaying the proceedings before the DRT instituted on 12 June 2003 by over 13 years.

14] In the case of ***P. Anand Gajapathi Raju vs. P.V.G. Raju***

(dead)², the Hon'ble Supreme Court has laid down the requirements which the parties have to comply with, before the court can refer the parties to arbitration under section 8 of the 1996 Act. The observations in paragraph 5, read thus :

“The conditions which are required to be satisfied under sub-sections (1) and (2) of S. 8 before the Court can exercise its powers are :

- (1) there is an arbitration agreement;*
- (2) a party to the agreement brings an action in the Court against the other party;*
- (3) subject matter of the action is the same as the subject matter of the arbitration agreement;*
- (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.”***

[emphasis supplied]

15] In the case of **Branch Manager, Magma Leasing and Finance Limited & Anr. vs. Potluri Madhavalata & Anr.**³, the Hon'ble Supreme Court after quoting the text of section 8 of the 1996 Act, at paragraph 17 has analysed the position, thus :

“An analysis of section 8 would show that for its applicability, the following conditions must be satisfied:

- (a) that there exists an arbitration agreement;*
- (b) that action has been brought to the court by one party to the arbitration agreement against the other party;*
- (c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement;*
- (d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and***
- (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.”***

[Emphasis supplied]

16] In the case of **Booz Allen and Hamilton Inc. vs. SBI Home**

² 2000 (4) SCC 539

³ (2009) 10 SCC 103

Finance Limited & Ors.⁴, the Hon'ble Supreme Court in the context of the provisions contained in section 8 of the 1996 Act reiterated the position that application seeking reference to arbitration has to be made not later than when submitting the first statement on the substance of the dispute. In this regard, the Hon'ble Supreme Court has held that not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of a written statement will be construed as '*submission of a statement on the substance of the dispute*', if by filing such statement / application / affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek a reference to arbitration.

17] This Court, in the cases of ***Garden Finance Limited vs. Prakash Industries Ltd. & Anr.***⁵, ***Pamvi Consultance Services Ltd. vs. Global Syntex (Bhilwara) Ltd.***⁶ and ***Ganesh Trading Company & Anr. vs. Government of Maharashtra & Ors.***⁷ has held that it is mandatory for a party seeking reference under section 8 of the 1996 Act to make an application in writing before submitting his first statement on the substance of the dispute and it is only then that the judicial authority gets the jurisdiction to make reference under section 8 of the 1996 Act. Once a party submits his first statement on the substance of the dispute i.e. on merits, it can be assumed that such a party has submitted to the jurisdiction of the judicial authority and the judicial authority thereafter ceases to have jurisdiction to refer the dispute to arbitration, unless of course, both the parties consent to the making of such reference. In the case of *Garden Finance Limited* (supra) and *Pamvi Consultance Services Ltd.* (supra), this Court has

4 (2011) 5 SCC 532

5 2001 (4) Mh.L.J. 425

6 2004 (4) Mh.L.J. 748

7 2007 (4) Mh.L.J. 715

rejected the contention that an oral application suffices or that the judicial authority can *suo motu* direct the parties to arbitration by invoking the arbitral clause.

18] In the case of **Atul Singh & Ors. vs. Sunil Kumar Singh & Ors.**⁸ the Supreme Court has ruled that even requirement of filing the original agreement or the duly certified copy thereof along with the application under section 8 of the 1996 Act is a mandatory requirement. The observations in paragraph 19, read thus :

“19. There is no whisper in the petition dated 28-2-2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with sub-section (2) of section 8 of the 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of section 8 of the Act, Defendant 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28-2-2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.”

19] In the facts and circumstances of the present case, it is quite clear that there was no compliance with the predicates of section 8 of the 1996 Act and therefore, the DRT's order dated 9 September 2009, was clearly in excess of jurisdiction. Decision in the case of *Ardy International (P) Ltd.* (supra) upon which reliance was placed by Mr.Mody does not assist the petitioner. The main issue involved in the said case was whether a civil court, under the guise of exercising powers under section 8 of the 1996 Act can restrain the arbitral proceedings from commencing or continuing. Even in paragraph 4 of

8 (2008) 2 SCC 602

the said decision, the Hon'ble Supreme Court has held that once the opposite party objects to the application for interim reliefs in a suit bringing to the notice of the court the existence of the arbitration agreement, thereafter, the proceedings could have been continued only within the parameters of section 8 of the 1996 Act and the proceedings under section 8 can never result in an order restraining arbitral proceedings. Based upon a stray sentence or a stray word, the petitioner cannot purport to confer upon a judicial authority, jurisdiction which is clearly not vested in it. Observations in a judgment, have obviously to read in the context in which they are made.

20] In the matters of precedents, it is necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in a judgment cannot be regarded as full exposition of law. As has been held by the Hon'ble Supreme Court in the case of ***Union of India & Ors. vs. Dhanwanti Devi & Ors.***⁹, it is not everything said by a Judge whilst giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates - [i] findings of material facts, direct and inferential. An inferential findings of facts is the inference which the Judge draws from the direct, or perceptible facts; [ii] statements of the principles of law applicable to the legal problems disclosed by the facts; and [iii] judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in decision is its ratio and not

9 1996 (6) SCC 44

every observation found therein not what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. Thus construed, the decision in case of ***Ardy International (P) Ltd. (supra)***, cannot assist the petitioner who has failed to comply with the predicates of section 8 of the 1996 Act.

21] Taking into consideration the manner in which the petitioner has abused the process of the Court and delayed the proceedings before the DRT by raising a belated and frivolous objection when the case was posted for final hearing, we do not deem it appropriate to interfere with the direction made by the DRAT in the matter of deposit of Rs.10,00,000/- by the petitioner before the DRT, in order to show *bona fides*. At the behest of such a petitioner, there is no case made out to exercise equitable jurisdiction under Articles 226 and 227 of the Constitution of India, in order to interfere with such direction. Rather, this is a fit case for imposition of exemplary costs upon the petitioner for having succeeded in derailing the proceedings before the DRT which was instituted on 12 June 2003 for over 13 years. By this, the petitioner virtually succeeded in frustrating the very objective of enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (said Act) with regard to speedy disposal of such

matters.

22] In the case of **Standard Chartered Bank vs. Dharminder Bhohi & Ors.**¹⁰ 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 inextricably 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.”

23] In the aforesaid decision, the Hon'ble Supreme Court has emphasised upon the necessity of speedy disposal of matters by the 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 22 in the said Act, was to ensure that the DRT and DRAT are not bogged down by

¹⁰ (2013) 15 SCC 341

undue procedural restraints, thereby stalling the speedy disposal of such matters. In paragraphs 25 and 26, the Hon'ble Supreme Court has observed thus :

25. ***Thus, the intendment of this legislation is for speedy recovery of dues to the bank. In this backdrop, the tribunals are expected to act with quite promptitude regard being had to the nature of the lis and see to it that an ingenious litigant does not take recourse to dilatory tactics.*** It may be aptly noted that an action taken by the bank under SARFAESI Act is subject to assail before the DRT and a further appeal to the DRAT. ***Neither the DRT nor the appellate tribunal can afford to sit over matters as that would fundamentally frustrate the purpose of the legislation.*** In the case at hand, we really fail to fathom what impelled DRAT to keep on adjourning the matter and finally dispose it by passing an extremely laconic order. It is really perplexing. A tribunal dealing with an appeal should not allow adjournments for the asking. It should be kept uppermost in mind of the Presiding Officer of the tribunal that grant of an adjournment should be an exception and not to be granted in a routine and mechanical matter. In the case at hand, such a delineation by the DRAT only indicates its apathy and indifference to the role ascribed to it under the enactment and the trust bestowed on it by the legislature. A curative step is warranted and we expect that the Chairman and the members of the DRAT shall endeavour to remain alive to the obligations as expected of them by such special legislations, namely, the SARFAESI Act and the RDB Act.

26. ***Be it noted, the principal purpose is to see that recovery of dues which is an essential function of any banking institution does not get halted because of procrastinated delineation by the tribunal.*** It is worthy to note that the legislature by its wisdom under section 22 of the RDB Act has provided that the DRT and the appellate tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the rules framed. ***They have been conferred powers to regulate their own procedure as given to them. It is so, for the very purpose of their establishment is to expedite disposal of the applications and the appeals preferred before them. They have the character of specialized institutions with expertise and***

conferred jurisdiction to decide the lis in a speedy manner so that the larger public interest, that is, the economy of the country does not suffer. But, a pregnant one, in the case at hand DRAT did not dispose of the appeal for four-and-a-half years. We can only say that apart from the curative step the tribunal as well the DRAT have to rise to the occasion, for delay in adjudication of these type of litigations brings a long term disaster. Acute slumber shall not do.

(emphasis supplied)

24] There is yet another disturbing aspect of this matter. The DRAT by the impugned order dated 19 February 2015 had directed the petitioner to deposit an amount of Rs.10,00,000/- with the DRT within a period of four weeks. Despite the circumstance that there was no interim order made by this Court, the petitioner has not bothered to deposit the said amount. The mere institution of a petition, does not operate as a stay. Obviously, the petitioner has avoided compliance by merely lodging this petition but not moving the same for obtaining interim reliefs. Such conduct also constitutes an abuse of the process. The petitioner is now directed to deposit the amount of Rs.10,00,000/- within a period of four weeks from today before the DRT.

25] Since we are satisfied that the petitioner has abused the judicial process by raising frivolous and unsustainable preliminary objection at the stage when the matter was posted for final hearing before the DRT and thereby succeeded in derailing proceedings for over a decade, we deem it appropriate to dismiss this petition with costs computed at Rs.10,000/- (Rupees Ten Thousand). The petitioner to pay such costs to the respondent within a period of four weeks from today.

26] The DRT is directed to dispose of original application No. 100 of 2005 as expeditiously as possible and in any case within a period of

three months from the date of production of authenticated copy of this order.

27] The parties to appear before the DRT on 28 March 2016 and produce authenticated copy of this order.

28] All concerned to act on basis of authenticated copy of this order.

CHIEF JUSTICE

(M.S.SONAK, J.)

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