

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.09.2016

PRONOUNCED ON: 28.09.2016

CORAM:

THE HONOURABLE Mr.SANJAY KISHAN KAUL, CHIEF JUSTICE

AND

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

OSA.No.4 of 2010 and
OSA.No.317 of 2011

M/s.Cambridge Solutions Limited
Bangalore 560095

Appellant-both OSAs

Vs.

1. Global Software Limited, Chennai-18
2. ING Vyseya Bank Limited, Chennai-17
3. DSQ Software Limited, Chennai-35
4. The Debts Recovery tribunal-I, Chennai-2
5. The Recovery Officer-II, D.Dwarakanath
Debts Recovery tribunal, Chennai-2

Respondents-both OSAs

Prayer:- These Original Side Appeals are filed against the order and decretal orders, dated 30.09.2008 made in A.No.339 of 2008 in CS.No.765 of 2007 and dated 23.12.2010 made in OA.No.1034 of 2007 in CS.No.765 of 2007 by the learned single judge of this Court, respectively.

For Appellant : Mr.M.K.Kabir, SC for Mrs.L.Mythili-OSA.4/10
Mr.M.K.Kabir, SC for Ms.K.Padma-OSA.317/11

For Respondents : Mr.Rahul Balaji for
M/s.Sathish Parasaran-R1-both OSAs

Mr.Raghunathan for
M/s.T.S.Gopalan & Co-R2-both OSAs

R3-No appearance

ORDER

(The order of the court was made by R.MAHADEVAN, J.)

OSA.No.4 of 2010 is filed against the order and decreetal order, dated 30.09.2008, made in A.No.339 of 2008 in CS.No.765 of 2007 by the learned single judge of this Court, dismissing the application. OSA.No.317 of 2011 is filed against the order and decreetal order, dated 23.12.2010, made in OA.No.1034 of 2007 in CS.No.765 of 2007 by the learned single judge of this Court.

2. The appellant herein in both the appeals is the 1st defendant in the above suit and the applicant in A.No.339 of 2008 filed to reject the plaint, contending that the suit is not maintainable. The appellant was the 1st respondent in OA.No.1034/2007 filed by the plaintiff. The said application was filed to restrain the appellant, its men or agent or any one claiming under them from any manner seeking to reflect the redemption of the debentures in the books of accounts. As against the dismissal of the application to reject the plaint, OSA.No.4/2010 has been filed. As against the decreetal order, allowing OA.No.1034/2007, the OSA.No.317/2011 has been filed.

3. For the sake of convenience, the parties are referred as per their

rank in the suit.

4. The suit has been filed to pass a judgement and decree:-

- a) declaring that the orders of the 5th defendant, dated 13.10.2004 and 12.07.2005 in DRC.No.154/2003 as null, void, fraudulent and without jurisdiction;
- b) consequently declaring the issuance of 6,25,000 duplicate debentures by the 1st defendant to the 2nd defendant and redemption of the same as wholly illegal void, non-est and being fraudulent;
- c) issuing a mandatory injunction, directing the 1st defendant to redeem the schedule mentioned debentures with the 1st and 2nd defendants being jointly and severally liable to pay Rs.6,25,00,000/- being the face value of the debentures together with interest at the rate of 11% per annum compounded annually from the date of issuance of the debentures to the date of payment in terms of the agreement, dated 01.08.2002 pursuant to which the schedule mentioned debentures were issued;
- d) directing the defendants to pay the costs of the suit.

In short, the suit has been filed to nullify the orders passed under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (herein after referred to as the RDDB Act) on the ground of collusion between the defendants 1, 2 and 3.

5. The case of the plaintiff in short is as follows:-

The 3rd defendant was allotted 15,00,000/- debentures by the 1st defendant in consideration of assignment of certain rights to them based on an agreement, dated 01.08.2002. As per the terms of the agreement, the 1st

defendant had to pay a sum of Rs 15,00,00,000/- on the expiry of 5 years with interest @11% per annum. The original debenture certificates were also in the custody of the 3rd defendant. The plaintiff had made some advance payment to the 3rd defendant in April 2003 and in consideration thereof, the 3rd defendant sold 6,25,000 debentures to the plaintiff, who adjusted Rs 5,62,20,000/- and raised an invoice dated 30.06.2003 for the transaction. The plaintiff also passed a board resolution reflecting the intention to purchase the debentures. The original debentures covered under 13 certificates were handed over to the plaintiff. Surprisingly, the case of the plaintiff is that though they purchased the debentures, they neither transferred the same to their name nor demanded interest. Subsequently, in April 2006, the plaintiff sought to sell 5,00,000 non-convertible debentures to one Mercury Fund Management Company Limited to raise funds. However, when the said company approached the 1st defendant for transferring the debentures, the transfer documents were returned with a letter informing about the impugned orders dated 13.10.2004 and 12.07.2005 of the Debt Recovery Tribunal, Chennai in a proceedings initiated by the 2nd defendant bank against the 3rd defendant. The above orders have been passed in DRC.No.154/2003, wherein the debentures of the 1st defendant, held by the 3rd defendant was attached and the 1st defendant was prohibited from transferring the debentures and a direction was given for the issuance of duplicate certificates. While so, a compromise memo was entered between the 1st

defendant and the 2nd defendant on 08.06.2007, by which 6,25,000 debentures valued at Rs 6,25, 00,000 was issued in favour of the 1st defendant for closure of the proceedings. The Plaintiff has filed separate applications before the DRT and the same are pending. However, since the 5th defendant has also colluded with the defendants 1 and 2, the present suit has been filed. The Plaintiff has also alleged that by allowing the fraudulent transaction, the 3rd defendant has also been benefited as despite seceding consideration from the plaintiff, the 1st defendant has been allowed to redeem the duplicate debentures. The 1st defendant initially challenged the orders of the recovery officer before the DRT and the latter has preferred an appeal, which is still pending. Under the circumstances, the plaintiff filed the suit and also applications for interim reliefs, including injunction to refrain the 1st defendant from disclosing the debentures as redeemed in their books of accounts and the interim injunction application was allowed on 23.12.2010, as against which OSA.No.317/2011 has been filed.

6. The 1st defendant filed their counter to the interim applications and also filed an application to reject the plaint, contending that the allegations in the plaint are false, that the Suit has been filed suppressing many material facts and particulars, that the suit is not maintainable as the plaintiff has an efficacious alternative remedy under the RDDB Act and already having invoked the same, cannot sustain the suit. The 1st defendant also pointed out that it is only after a

decree was passed, recovery proceedings were initiated and the 3rd defendant never pleaded that the debentures were sold to the plaintiff. It was also contended that the plaintiff filed MA.No.7 of 2007 to implead itself as a party before the DRT. Since the plaintiff can file an appeal against the orders of the 5th defendant, the suit is unsustainable. It was also contended that since the decree of the DRT against the 3rd defendant has become final, the plaintiff can only sue the 3rd defendant for recovery of money. However, the present suit is filed at the instigation and in collusion with the 3rd defendant. When the order is passed based on a compromise decree between the 2nd and 3rd defendants, the same cannot be challenged by the 3rd defendant and the issue under the guise of fraudulent transaction cannot be re-opened in the present suit. There is no collusion and the 1st defendant only redeemed its debentures. Under the circumstances, the 1st defendant sought for rejection of the plaint.

7. After hearing the parties, the learned single judge has dismissed the application on 30.09.2008, holding as follows:

- a. that order have been passed by the 5th defendant directing the issuance of duplicate certificates even before the lapse of 15 days notice period,
- b. Whether there was any collusion between the plaintiff and the 3rd defendant can be culled out only during trial,
- c. It is well within the rights of the plaintiff to challenge the recovery proceedings alone, without challenging the consent

decree, as it is not aggrieved by the same,

d. When fraud is alleged, the allegations can be gone into only in a suit and the proceedings pending before the DRT cannot be ground for rejection of the plaint,

e. The Judgement of a Division Bench of this Court in 2008 (1) CTC 471 was followed to hold that when fraud is played to obtain orders from the tribunal, the suit is maintainable and the civil right of the plaintiff cannot be taken away.

Aggrieved, the 1st defendant has filed OSA.No.4/2007.

8. In so far as OA.No.1034/2007 is concerned, this court, on 23.12.2010, holding that the interim orders were granted on 05.09.2007 and was extended from time to time and recording that prima facie the 5th defendant was not right in ordering the issue of duplicate debentures and sale of 6,25,000 debentures on the value indicated by the bank without resorting to public auction, allowed the application. Aggrieved, the 1st defendant has filed OSA.No.317/2011.

9. Both the Appeals were heard together with the consent of all the counsel.

10. The learned counsel for the appellant/1st defendant contended that the suit is an abuse of process of law and that no suit would lie against the orders of the DRT in view of Section 20 of the RDDB Act. The learned counsel further contended that the learned judge erred in applying the facts and the

judgement of the Division Bench. The learned counsel also contended that the plaintiff cannot invoke parallel remedies and having invoked the jurisdiction of the DRT for the same relief, the suit would be barred under Order VII Rule 11 of CPC. The learned counsel pointed out that no fraud was played by either party on the tribunal and hence the analogy of the learned judge is per se bad in law. The learned counsel also pointed out from the pleadings in the plaint that the suit could not be sustained as the plaintiff itself has admitted to have invoked the jurisdiction of the DRT. Further, mere repeated pleadings of fraud and collusion by suppression of material facts and misplaced facts cannot sustain the suit. No documents have been produced to show that fraud has been played on the tribunal. The learned counsel also contended that the recovery proceedings is based on the consent decree and once the consent decree cannot be challenged, the recovery also cannot be challenged. Further, there are no procedural errors and even if there are any such error, it has to be challenged only under the mechanism provided under the RDDB Act. The learned counsel also contended that the 3rd defendant has set up the plaintiff to file the instant suit after enormous delay. The reason given by the plaintiff in the suit for not transferring the certificates is unacceptable and it can be only construed that the payment towards some other consideration has been misused to create records as if the debentures were acquired by the plaintiff from the 3rd defendant. The learned counsel contended that the injunction not to reflect the redemption is against the provisions of the Companies Act, 1956 and the Securities Contract

(Regulation) Act, 1956. Having paid the consideration and redeemed the debentures, the same cannot be shown as not reflected, more particularly when the redemption was declared in the annual returns even before the suit was filed. The learned counsel also contended that the learned judge failed to see that the debentures were not sold but only redeemed and the amount was adjusted towards the total outstanding of the 3rd defendant. The learned counsel relied upon various decisions reported in in 2001 (6) SCC 569 (Punjab National Bank Vs. O.C.Krishnan and others), 2006 (9) SCC 252 (State Bank of India Vs. Allied Chemical Laboratories and another), 2007 (1) SCC 106 (Industrial Investment Bank of India Limited Vs. Marshal's Power and Telecom (I) Limited and another), 2004 (8) SCC 588 (A.C.Ananthaswamy and others Vs. Boraiah (Dead) by LRs), AIR 1994 SC 2562 (Bijendra Nath Srivastava (Dead) through LRs Vs. Mayank Srivastava and others), AIR 1963 BOM 244 (Namdeo Digamber Gaikwad and others vs. Vijaykumar Ramchandra Shaha and others), AIR 1986 ORI 97 (Padma Bewa Vs. Krupasindhu Biswal and others), AIR 1977 SC 2421 (T.Arivanandam Vs. Satyapal), AIR 1998 SC 634 (ITC Limited Vs. DRT), 1999 AIHC 470 (Nesammal and others Vs. Edward and others), AIR 2001 SC 2790 (Salkia Businessmen's Association and others Vs. Howrah Municipal Corporation and others), AIR 2002 P& H 20 (Santosh Kumar Vs. KaramDevi) and AIR 1956 MAD 301 (R.Samudra Vijayam Chettiar Vs. Srinivasa Alwar and other) in support of his contentions and prayed that the appeals may be

allowed.

11. Per Contra, the learned counsel appearing for the plaintiff has vehemently contended that there is nothing perverse in the orders of the learned judges in both the applications, that the suit is maintainable as the debentures were attached and duplicates were ordered to be issued by playing fraud, in collusion and without notice to the 3rd defendant, that the plaintiff is the holder of the debentures and without their knowledge, the 5th defendant without following the procedures has permitted the bank to sell more debentures to the 1st defendant, that the plaintiff is not aggrieved by the consent decree and is agreed only by the orders in the recovery proceedings, that it is not mandatory to transfer the debentures in their name and the 3rd defendant has allowed the orders to be passed against it in collusion with the 2nd defendant and relying upon the decision reported in 2008 (1) CTC 471 (S.V.Subramaniam Vs. Cypress Semiconductor Technology India Private Limited), order dated 18.12.2014 made in CRP(PD)No.941 and 2496/2011, 2006 (6) SCC 94 (Bijendra Nath Srivastava (Dead) through LRs Vs. Mayank Srivastava and others) and 2009 (8) SCC 646 (Nahar Industrial Enterprises Limited Vs. Kong Kong and Shanghai Banking Corporation) sought for dismissal of the appeals.

12. The learned counsel appearing for the 2nd defendant bank

contended that the compromise was entered with the 3rd defendant even before the alleged transfer of debentures to the plaintiff and therefore such transfer is void ab initio. It was also contented that if the 3rd defendant committed a breach of the compromise, the bank was entitled to recover the entire dues and the order of attachment was passed for 6,25,000 debentures and therefore, it is prayed for realizing the amounts due by sale of those debentures and eventually the 1st defendant choose to redeem the debentures and the same was recorded and the amount was adjusted towards the outstanding amount of the 3rd defendant. Under the circumstances, there is no illegality in the orders of the 5th defendant and there is no fraud or collusion in the transaction or orders. Hence, the suit is not sustainable.

13. Heard all the parties in detail and perused the plaint and the documents.

14. It is not in dispute that as against the orders of the recovery officer, there is a remedy before the DRT and as against the order of the DRT, an appeal before the DRAT as per the provisions of the RDDB Act. The application to reject the plaint has been disallowed on the premise that the suit is maintainable as there are allegations of fraud in the plaint. On a perusal of the plaint, it is seen that at several places, the plaintiff has alleged fraud and collusion between the parties and not against the tribunal. It is not the case of

the plaintiff that a fraud has been played on the tribunal and orders were obtained. It is not sufficient if just fraud is pleaded and there must be material to show that fraud is committed. In this Context, the learned counsel for the 1st defendant has relied upon the following judgements.

15. In AIR 1986 ORI 97 (**Padma Bewa Vs. Krupasindhu Biswal and others**), it has been held as under:-

“6. A plea of fraud is to be raised in the pleadings by giving the particulars thereof as required under Order 6, Rule 4 of Civil P.C. Pleadings should be concise, but they should also be precise. When fraud is charged against a defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which is alleged. It is not enough to use such general words as 'fraud', 'deceit' or 'machinations'. The circumstances on which a plea of fraud is raised must be incompatible with the hypothesis of good faith.

7. When misrepresentations are alleged, the party pleading them should state as to each misrepresentation, its date and whether it was made in writing or verbal and as to each verbal misrepresentation, the occasion thereof. While it is true that 'undue influence', 'fraud' and 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of Civil P. C. required to be separately pleaded, with specificity, particularity and precision. (See AIR 1976 SC 163 Afsar Shaikh v. Soleman Bibi).”

16. In AIR 1994 SC 2562 (**Bijendra Nath Srivastava (Dead) through LRs Vs. Mayank Srivastava and others**), it has been held as under:-

15. This is in consonance with the rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it. (See : Abdool Hoosein Zenail Abadin

v. Charles Agnew Turner (1887 14 Ind Additional Public Prosecutor 111 at p.125)) The same is true for the charge of misconduct. This means under Order 6 Rule 4 CPC particulars have to be furnished of the plea of fraud or misconduct raised in accordance with Order 6 Rule 2 CPC and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings. “

17. In 2004 (8) SCC 588 (A.C.Ananthaswamy and others Vs.

Boraiah (Dead) by LRs), it has been held as under:-

“5. We do not find any merit in this appeal. Firstly, in the present case, Patel Chikkahanumaiah had moved an application under Order 9 Rule 13 CPC for setting aside the ex-parte decree on the ground of non service of summons in which fraud was not alleged. As stated above, Patel Chikkahanumaiah had moved R.A. No.54 of 1977 in which there was no such allegation. Secondly, the present suit has been instituted to set aside the ex-parte decree on the ground that the decree was obtained by fraud and misrepresentation. Fraud is to be pleaded and proved. To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot per se make the representor guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party making such representation. [See: Pollock & Mulla on Indian Contract & Specific Relief Acts (2001) 12th Edition page 489].

6. In the present case, there is no evidence of fraud. The present case is a matter of non-service of summons. In the present case, there is a bare allegation of fraud. In the case of Choksi Bhidarbhai Mathurbhai v. Purshottamdas Bhogilal Shah reported in [AIR 1962 Gujarat 10], it has been held that where the only fraud alleged is a bare non service of summons then such a suit to set aside the decree on alleged ground of fraud was not maintainable. Lastly, no substantial question of law arises in this appeal.”

18. The above judgements illustrate that specific instances and acts

of fraud with evidence have to be pleaded in the plaint. Mere statements are not enough. Upon perusal of the plaint in this case, it is evident that the agreement for issuance of debentures in favour of the 3rd defendant was entered on 01.08.2002. The original application seems to have been filed in November 2002. The compromise between the 2nd and 3rd defendant was entered into and decree was passed by the DRT on 21.03.2003. As per the memorandum of compromise, the 3rd defendant was to transfer the debentures and shares in favour of the 2nd respondent within 45 days. While so, the 3rd defendant could not have transferred the debentures to the plaintiff in June 2003 pursuant to an arrangement in April 2003 and the very transaction as averred in the plaint raises doubts as to the bona fides of the plaintiff. It is also evident that the debentures were assigned only in consideration of the sums already paid towards some other transaction. The averments in the plaint are drafted in such a way as if to give an impression that the 2nd and 3rd defendants have colluded and brought in a consent decree and the 1st defendant was allowed to redeem the debentures. However, upon perusal of the plaint and the documents in support thereof, the collusion seems to be other way around.

19. The next averment about fraud is that the attachment and direction to issue duplicate certificates are bad in law and the 5th respondent has violated the procedures. Again, on a perusal of the compromise between the 2nd

defendant and the 3rd defendant, filed as Document No.14 along with the plaint , it is evident that upon failure to fulfill the terms of the compromise, the O.A.505/2002 would stand decreed and the original claim would become payable. Therefore, the 5th defendant had attached the entire 6,25,000 debentures. If the 3rd defendant had acted in consonance with the compromise decree, the 2nd defendant bank would have been entitled to only 2,75,000 debentures. However, that was not the case to be and the 3rd defendant committed the breach of the terms and conditions of the compromise decree. Hence, we do not find any error on the part of 5th defendant in attaching all the debentures.

20. Again on a perusal of the memo dated 11.07.2005, it is evident that it was pleaded for a direction to the 3rd defendant to produce the original debentures, failing which the duplicate debentures were sought to be issued. However, the 5th defendant straight away directed the issuance of the duplicate debentures. Though we are not inclined to deliberate the correctness of issuance of such a direction directly, it can only be because that the 3rd defendant has failed to appear on earlier occasions. It can utmost be termed only as a procedural lapse, but in no sense could lead to fraud or collusion. Also, this court is of the view that the redemption of the debentures by the 1st defendant from the 2nd defendant, cannot be equated with sale. The 1st defendant had 5

years to redeem the debentures and he has exercised his right and redeemed the same in time. The consideration has also been credit of the 3rd defendant's account. Hence, the finding of the learned judge that only 2,75,000 debentures could have been sold by auction is untenable as the bank had sought to enforce the decree as against the original claim amount as per the compromise decree. Also, as rightly contended by the learned counsel for the 1st defendant, after redemption, the 1st defendant is entitled to disclose such redemption in their books of accounts. There cannot be any injunction or direction against the right created under a statute.

21. This court, after careful perusal of the plaint, feels that the averments regarding fraud and collusion are non-existent and have been made only to sustain the suit. Procedural irregularities by the tribunal not affecting the parties concerned cannot amount to fraud. The Honourable Supreme Court in its decision reported in **AIR 1977 SC 2421 (T.Arivanandam Vs. Satyapal)** has held as follows:-

“5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Or. VII R.11 C.P.C. taking care to see that the ground mentioned therein is

fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good."

22. It is very clear from the above judgment that it is the duty of every trial court to carefully analyze whether the cause of action pleaded in the averments in the plaint is real or fictitious. In case, it is found to be surreal, the plaint must be rejected at the thresh hold with costs.

23. It is settled law that the averments in the plaint and documents filed thereon alone would be germane to consider the application for rejection of the plaint. In the case on hand, upon considering the averments in the plaint and the documents, it is found that the plea of fraud is only illusionary.

24. The learned counsel for the plaintiff has relied upon the decision reported in **2008 (1) CTC 471** and the order dated **18.12.2014** made in **CRP(PD)No.941 and 2496/2011**, cited supra, in support of his contention that when fraud is pleaded, the civil suit is maintainable. The above judgements are not applicable, as the facts and circumstances, under which they were passed, are completely on different factual matrix. In the judgment passed by the Division

Bench, which was also followed by the learned judge, the civil suit was transferred from the High Court to the tribunal and in the process, the applicant therein played fraud on the tribunal by including properties in the plaint which were not part of original plaint and then caused the properties to be sold for a paltry sum. Only later, after the final orders were passed by the DRT, amendment petition was filed. Similarly, in the case decided in CRP, the case of the plaintiff was in the strength of a purchaser prior to sale by the tribunal and also despite the fact that the property was not partitioned, for the alleged debt of the borrower, who held a share, the entire property was allowed to be sold. The suit was filed also for partition and was not restricted to the orders of the tribunal. The facts in the case on hand is different and the allegations of fraud are not evident even from the averments in the plaint.

25. The plaintiff in the case on hand has already approached the tribunal as against the orders of the 5th defendant. The relevant provisions of the RDDB Act in Sections 17, 17A, 18, 19 and 20 deal with jurisdictional appeal remedies and further appeal against the order of the recovery officer.

26. It is evident that the plaintiff is not without remedy under the RDDB Act. A perusal of the above provisions clearly illustrate the availability of efficacious alternative remedy. Sections 20 and 30 enable “any person” aggrieved by “an order” of the tribunal or the recovery officer may file an appeal

under the respective provisions. The powers of the tribunal under Section 22 is wide enough and is similar to that of a civil court. Hence, immediately after the knowledge of the order, the plaintiff could have approached the tribunal. The only way, in which the plaintiff could sustain the suit, is by way of pleading fraud, which has been found to be illusory.

27. The following judgments have been relied upon by the learned counsel for the 1st defendant to contend that only the statutory remedies are to be availed as against the orders of the DRT.

28. In 2001 (6) SCC 569 (Punjab National Bank Vs. O.C.Krishnan and others), it has been held as under:-

“6.The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this last track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act. ”

29. In 2006 (9) SCC 252 (State Bank of India Vs. Allied Chemical Laboratories and another), it has been held as under:-

“6. We have heard learned counsel for the parties. We fail to understand how the High Court could have exercised its jurisdiction under Articles 226 and 2327 of the Constitution to set aside a decree/final order passed by the DRT on 9.4.2003, in a collateral proceeding wherein the decree/final order was challenged indirectly on the ground that the application of the respondent for cross examining the deponent had earlier been wrongly rejected. We have no hesitation in holding that when the DRT did not accede to the request of the respondent to cross examine the deponent, it could have, in the appeal preferred by it, assailed the decree/final order on that ground and the Appellate Authority would have passed appropriate orders. The mere fact that the respondent had not been given an opportunity to cross examine the deponent did not enable the respondent to bypass the provision for appeal and approach the High Court directly by a writ petition under Articles 226 and 227 of the Constitution, challenging the decree/final order on the ground that the order earlier passed, refusing to permit the cross examination of the deponent, was erroneous.

7. In the facts and circumstances of this case, we hold that the Respondent ought to have availed the remedy provided under Section 20 of the Act and preferred an appeal before the Appellate tribunal wherein he could have urged all his grievances and challenged the decree/final order passed by the DRT. The order passed by the High Court in exercise of writ jurisdiction is wholly unjustified and it is accordingly set aside.”

30. In 2007 (1) SCC 106 (Industrial Investment Bank of India Limited Vs. Marshal's Power and Telecom (I) Limited and another), it has been held as under:-

“8. We also find that the Division Bench has clearly acted illegally in purporting to pass an interim order of injunction restraining the enforcement of any order that may be passed by the Debts Recovery tribunal. The Debts Recovery tribunal is a special forum created by a special enactment for the purpose of

enforcement of special types of claims arising in favour of financial institutions. Thus, competent proceedings are instituted before such a tribunal by a financial institution seeking to enforce its claimed rights. Whatever defences the plaintiff herein may have against the claims of the first defendant before the Debts Recovery tribunal, have to be put forward by the plaintiff before the Debts Recovery tribunal. The mere fact that the plaintiff chose to rush to the Civil Court on receipt of a notice from the first defendant in an attempt to thwart the enforcement of the obligations it has allegedly incurred, does not justify the grant of an interim order of injunction restraining the enforcement of the rights arising out of an alleged hypothecation and a charge created by the plaintiff in favour of the first defendant. That apart, to grant an injunction restraining the enforcement of orders passed by the tribunal having jurisdiction to pass such orders cannot normally be granted unless it is a case of fraud or the existence of some such vitiating factor is established or prima facie made out. Even then, the order of injunction as now granted could be granted only in exceptional cases.

9. We had recently occasion to consider the scope of the raising of a counter claim before the Debts Recovery tribunal in *State Bank of India Vs. M/s Ranjan Chemicals Ltd. & Anr.* [2006 (10) SCALE 150]. It appears to us that the claims sought to be put forward by the plaintiff in the present suit is something that is really in the nature of a defence to the action initiated by the first defendant before the Debts Recovery tribunal or which could be put forward by way of a counter claim, if necessary. This aspect also had to be borne in mind before deciding whether a case for passing of an interim order of injunction has been made out or not. This aspect has also been ignored by the Division Bench.

10. In the result, we allow the appeal and setting aside the order of the Division Bench, restore the order of the learned single judge dismissing the application for interim injunction. We make it clear that it is open to the plaintiff to put forward all its contentions before the Debts Recovery tribunal and if it is thought appropriate, to get the suit filed by it transferred to the Debts Recovery tribunal to be tried as a cross suit or counter claim against the claim of the first defendant before the Debts Recovery tribunal. The first defendant appellant, would be entitled to its costs in this Court.”

31. The counsel for the plaintiff has relied upon the judgment of the Apex Court in 2009 (8) SCC 646 cited supra to contend that the debtor cannot initiate proceedings against the bank before the DRT to enforce his independent right and only a civil suit would lie, that a civil suit cannot be transferred to the DRT and the DRT would not have all the powers of a civil court. This judgment would also not come to the aid of the plaintiff because the plaintiff under the guise of independent right cannot challenge the order of the tribunal in a civil suit, when the appeal even by a third party to the original application is not barred. In the present case, the challenges are to the orders of the recovery officer based on a compromise decree. The judgment-debtor has initially chosen not to challenge the proceedings, but subsequently at about the same time, has challenged the recovery proceedings like the plaintiff by filing an application under the RDDB Act. Apparently, the plaintiff knowing that he cannot challenge the consent decree as it was passed even before the alleged date of purchase by the plaintiff, has filed the suit.

32. The next bone of contention by the learned counsel for the plaintiff is that the debentures need not be registered to stake a claim. The learned counsel has relied upon the judgment in 2006 (6) SCC 94 (**Standard Chartered Bank Vs. Andhra Bank financial Services Limited and others**). Again the judgment is not applicable to the facts of the case on hand. As held

above, even before the alleged purchase by the plaintiff, the debentures were part of the consent decree. Therefore, the 3rd defendant, who had lost its rights over the debentures, cannot convey any title. Also, in the agreement dated 01.08.2002, between the 1st and 3rd defendant, it is the 3rd defendant or the registered holder, who would acquire any right. The admitted case of the plaintiff is that the transfer was not affected, registration was not made and the consideration claimed to have been passed on, seems to be only an adjustment for the sum already parted. The Apex court has in the very same judgment held as follows;-

“99. In these circumstances, we are not satisfied that the evidence on record proves that HPD became the owner of the suit bonds or that CMF legitimately acquired the suit bonds from HPD or any other person by paying bona fide purchase value for them. Consequently, we must hold that CMF acquired no right, whatsoever, to the suit bonds. The suit bonds always remained the property of SCB irrespective of how they found their way into the hands of CMF.”

33. The judgment in fact would come to the aid of the 1st defendant. At the risk of repetition, since we have not found any fraud to have been played either by the 1st defendant or the 2nd defendant, the remedy to the plaintiff would only be to approach the tribunal or if so advised initiate a suit against the 3rd defendant alone for the recovery of money alleged to be paid by them. It is pertinent to refer to the judgments of the Allahabad High Court as under.

34. In (2005) 1 UPLBEC 944 (Lal Harsh Deo Narain sign and

another Vs. State of UP and others) it has been held as under:-

“6. In *K.R. Rashid and Sons v. Income-tax Investigation Commission and Ors.*, AIR 1954 SC 207, a Constitution Bench of the Hon'ble Supreme Court considered the issue involved herein that when the remedy under Section 8(5) of the Taxation of Income-tax (Investigation Commission) Act, 1947 has been pending whether the High Court could entertain the writ petition. The Hon'ble Apex Court held that a person may choose/effect where it will proceed with the alternative remedy or with the writ petition, but both cannot be perused simultaneously.

7. A similar view has been reiterated by another Constitution Bench in *Trilok Chandra Moti Chandra and Ors. v. H.B. Munshi*, AIR 1990 SC 898, however, the Hon'ble Apex Court cautioned that a Writ Court should entertain a writ petition in rare case's, where the ordinary process of law appears inefficacious that the Writ Court interferes even where other remedies are available.

8. In *G.B. Gosain v. State of Orissa*, (1963) 2 SCR 879, the Hon'ble Supreme Court held that even where an alternative remedy has been exhausted by a party, but that party could pursue any proceeding under Article 226 of the Constitution for the same relief.

9. A Constitution Bench of the Hon'ble Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and Anr.*, AIR 1961 SC 1506, held that even where a party has approached the alternative forum, the Court should entertain a writ petition of not, a straight jacket formula cannot be formulated. The Court may examine the facts and circumstances of the case and decide as to whether it was to entertain the petition or not. However, where the petitioner has already approached the alternative forum for appropriate relief, it is not appropriate that the writ petition should be entertained. The rule is passed on public policy and motivating factor is that of existence of the parallel jurisdiction in another Court.

10. In *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors.*, JT 2004 (Supp 2) SC 601, the Court held that mere availability of alternative forum for appropriate relief does not impinge upon the jurisdiction of the High Court to deal with the matter. Even if it is not a position to do so on the basis of the affidavits filed, however, if a party has already availed the

alternative remedy while invoking the jurisdiction under Article 226 of the Constitution it will not be appropriate to the Court to entertain the writ petition.

11. In *Jai Singh v. Union of India and Ors.*, AIR 1977 SC 898, the Hon'ble Supreme Court considered a case wherein the petitioner filed a writ petition which was dismissed in limine. Subsequently, he filed a suit agitating the same subject matter. The Court held that suit was not maintainable as a person cannot be permitted to pursue two parallel remedies in respect of the same subject matter at the same time.

12. In *Bombay Metropolitan Region Development Authority, Bombay v. Gokak Volkart Ltd. and Ors.*, (1995) 1 SCC 642, the petitioner therein had filed a writ petition during the pendency of the appeal before the Statutory Authority. The Hon'ble Apex Court held that such a writ was not maintainable.

13. Thus, in view of the above, the law can be formulated that the public policy demands that a person has a right to choose the forum for redressal of his grievance, but he cannot be permitted to choose two forums in respect of the same subject matter for the same relief. There may be a case of forum hunting that a party who filed a suit, may not be able to get the interim relief. It may abandon the remedy before the Civil Court and approach the remedy of filing the writ petition. Thus, it will amount to abuse of the process of the Court by forum hunting.

14. As the dispute regarding the title of the suit premises is pending before the Civil Court and petitioner cannot be permitted to agitate the issue simultaneously at another forum. More so, the facts of this case attract the doctrine of *lis pendens* it is not desirable to interfere with in the facts and circumstances of the case.

15. In *Dr. Buddhi Kota Subbarao v. K. Parasaran and Ors.*, AIR 1996 SC 2687, the Hon'ble Supreme Court has observed as under :

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

35. In IV (2005) BC 268 (Virendra Singh Vs. the Debt Recovery tribunal), it has been held as under:-

"17. Keeping in view the law settled by Apex Court referred herein above and relied upon by the parties undoubtedly this Court has got jurisdiction to entertain a writ petition. In the present case admittedly under Section 20 of the Act statutory appeal lies. For convenience Sub-section 1 of Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is reproduced as under:

"Appeal to the Appellate tribunal--(1) Save as provided in Sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a tribunal under this Act, may prefer an appeal to an Appellate tribunal having jurisdiction in the matter."

18. Apart from availability of statutory appellate remedy there is one more reason comes in the way to entertain the present writ petition. Against the order of cancellation of sale dated 19.8.2003 passed by Recovery Officer, admittedly petitioner had preferred an appeal, which is pending. The relief No. 2 relates to said controversy. Any observation or interference by this Court under writ jurisdiction will amount to interference with a proceeding pending before the appellate authority. Even if the present writ petition is entertained for relief No. 1, the observation of finding given by this Court shall affect the decision of appeal pending before the appellate authority. Once a person files an appeal against an order by exercising statutory appellate jurisdiction and the appellate authority entertains the appeal to decide the same on merit, then it shall not be open to such person to challenge the same order under Articles 226/227 of the Constitution of India, under writ jurisdiction, unless the appellate authority had entertained the appeal without jurisdiction. The jurisdiction of appellate authority has not been questioned by the petitioner.

The principle of law to this extent may be very well drawn from the Division Bench judgment of this Court, Lal Harsh Deo Narain Singh and Anr. v. State of U.P. and Ors. (supra), and judgment of Apex Court, State of Punjab and Ors. v. Punjab Fibers Ltd. and Ors. (supra).

19. Since, by the impugned order the Debt Recovery tribunal had granted permission to settle the dispute or compromise in view of RBI guidelines which has got direct nexus with the pending controversy before the appellate authority, it shall not be proper to interfere with the impugned order under the writ jurisdiction. The substantial illegality, infirmity or binding nature of other judgment of the tribunal under similar circumstance can very well be considered by appellate authority by entertaining the appeal under Section 20 of the Act. The Apex Court in a case *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar* (supra), held that the power of appellate Court is much wider than power conferred to High Court or Supreme Court. The appellate authority has got wide power to go into, interfere and decide the controversy in question.

For convenience Para 15 of the said judgment is reproduced as under:

"Section 116A provides for an appeal. The said provision must be given a liberal and purposive construction. The scope of an appeal should be held to be wider than an application for judicial review or a petition under Article 136 of the Constitution of India."

20. In view of above, on account of availability of alternative statutory appellate remedy the present writ petition is not maintainable. It shall be open to the petitioner to prefer an appeal under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. On account of pendency of controversy in this Court since more than a year has been passed and also on account of fact that an interim order was passed in petitioner's favour, the appellate authority is directed to entertain the appeal on merit without being influenced by delay and laches. In case, the appeal is preferred within a period of one month from today, the appellate authority shall decide the same simultaneously along with the pending Misc Appeal No. 154 of 2003 filed against the order dated 19.8.2003 in accordance to law. While deciding the appeal the appellate authority shall consider the ground raised by petitioner's counsel referred herein above apart from other grounds, which may be raised in the memo of appeal. The appellate authority shall decide both the appeals in accordance to law expeditiously and preferably within a period of four months from the date of receipt of certified copy of this Court. Parties shall maintain status quo for the period of four

months or till disposal of appeal whichever is earlier.

Subject to aforesaid observation, the writ petition is, dismissed on account of availability of alternative remedy.”

36. The judgments above referred to following the ratios in various cases would be squarely applicable. The plaintiff having already invoked the jurisdiction of the DRT cannot sustain the suit by invoking the original jurisdiction of this court for the very same relief. However, it is at liberty to take up the cause before the DRT. Also, even according to the plaintiff, the fact about attachment and issuance of duplicate debentures, came to their knowledge in April 2006 itself. But, the suit has been filed only in 2007. The reasons given by the plaintiff is not acceptable as even according to them, they had parted with huge money to the 3rd defendant and if the allegations of fraud are true, they ought to have approached the tribunal at the earliest. Therefore, we are of the view that the plaintiff would have no cause of action to set at naught the recovery proceedings initiated as per law and the orders passed by the competent authority having jurisdiction. Also, the suit is barred by the provisions of the RDDB Act. The learned judge has failed to consider the averments in the plaint with the documents carefully and has rather travelled with thhe contentions and probabilities of the case. The learned judge also failed to consider the implied bar under the RDDB Act. Hence, the order of the learned judge in A.No.339/2008 is set aside. The plaint is rejected. The plaintiff is at liberty to work out his remedy as per the provisions of the RDDB Act as against the 3rd

defendant, if so advised. For the reasons stated above and in view of the fact that the suit is held to be not maintainable, the order in OA.No.1034/2007 cannot survive. Hence, the same is set aside.

37. In the result, these original side appeals are allowed. No costs.

(S.K.K., C.J.) (R.M.D., J.)
28.09.2016

Index:Yes/No
Web:Yes/No
Srcm

THE HONOURABLE CHIEF JUSTICE
and
R.MAHADEVAN, J.

Srcm

To:

The Record Keeper, VR Section, Madras High Court

Pre-Delivery Judgement in
OSA.No.4 of 2010 and
OSA.No.317 of 2011

28.09.2016