

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 13264 OF 2017

Abarao s/o Bhagaji Khandagale
Age: 54 years, Occu: Agriculture,
R/o: Mayur Park, CIDCO,
Aurangabad
Plot No.37, S.No.185/2,
Rameshwar Nagar,
Harsul Area, Mayur Park,
Aurangabad – 431 001

... PETITIONER
(Orig. Certificate Debtor
Debt.No.4)

Versus

- 1) IDBI Bank Ltd.,
A banking company incorporated
and registered under the Companies Act,
1956 (1 to 1956) having its Branch
at Kushalnagar, Jalna Road, Aurangabad
(formerly the United Western Bank Ltd.
Branch at Kushalnagar, Jalna Road,
Aurangabad)
- 2) M/s Gurudatta Transport Service,
Prop. Shri Laxman s/o Tukaam Thombare
Age: Major, Occ: Transport Operator,
100, Rokadia Hanuman Colony,
Aurangabad 431 001
- 3) Shivaji s/o Bhikaji Deshmukh
Age: Major, occ: Business and
Agriculturist, R/o: 100,
Rokadia Hanuman Colony,
Aurangabad 431 001
- 4) Vijay s/o Mahanrao Kale,
Age: Major, occ: Service and
Agriculturist, R/o: At Post Bhendala,
Tq. Gangapur, Dist. Aurangabad

... RESPONDENTS
(Respondent No.1
Original Certificate
Holder)

Shri Siddharth R. Deshpande, Advocate for petitioner
Shri R. N. Chavan, Advocate h/f Shri V. A. Bagadiya, Advocate
for respondent No.1
Respondents No. 2 to 4 served.

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**CORAM : SUNIL P. DESHMUKH AND
R. G. AVACHAT, JJ.**

DATED : 10th DECEMBER, 2020

JUDGMENT (Per R. G. AVACHAT, J.) :-

. Rule. Rule made returnable forthwith and heard finally with consent of learned counsel for the parties.

2. The issue involved in this writ petition is whether the Debt Recovery Tribunal (for short, "DRT"), Auangabad, had jurisdiction to entertain and grant recovery certificate in the proceeding, being M. A. No.20 of 2006 in view of Section 31-A of the Recovery of Debts Due and Bankruptcy Act, 1993 (for short 'the Act of 1993').

FACTS :-

The respondent No.1 bank had filed a suit, being Special Civil Suit No. 298 of 2003 against respondent Nos. 2 to 4 and the petitioner herein, for recovery of a sum of Rs.7,16,910/- with future interest thereon. It was the case of

the respondent bank that respondent No.2 availed the loan facility and respondents No. 3, 4 and the petitioner stood guarantors for the said loan. The petitioner and the respondents No. 2 to 4 were proceeded *ex parte*. The suit came to be decreed against all of them on 28-06-2004, directing them to pay jointly and severally a sum of Rs.7,16,910/- along with future interest @ 18% p.a. with quarterly rest.

The respondent bank, then, initiated execution proceedings for recovery of the amount granted under the decree. The bank, however, chose to withdraw the execution proceedings and moved the DRT, Aurangabad on 11-08-2006 for grant of recovery certificate against the petitioner and the respondents No.2 to 4 as per the decree passed in Special Civil Suit No.298 of 2003. It was the proceedings bearing M.A. No.20 of 2006 before the DRT, Aurangabad. The petitioner and respondents No.2 to 4 were proceeded *ex parte* in the said proceedings. The DRT granted recovery certificate in favour of respondent bank on 11.02.2006. Based on the said recovery certificate, the Recovery Proceedings (No.63 of 2006) were initiated.

The petitioner had appeared in the said proceedings and moved application Exhibit-103 for dropping the said proceedings in view of Section 31-A of the Act of 1993. The Presiding Officer of the DRT was pleased to dismiss application vide its order dated 19-12-2016. The petitioner is, therefore, before this court, taking exception to the impugned order on the ground that the proceedings of grant of recovery certificate and consequential proceedings for recovery of the amount were without jurisdiction and therefore, *non est*.

3. Learned counsel for the petitioner relied on the judgment of this Court in Writ Petition No.1504 of 2015 (Akbar Ali Khan s/o Mehboob Ali Khan Vs. Maharashtra Gramin Bank through its Manager) decided on 18-07-2016. On the question of an alternate remedy in the nature of appeal, learned counsel for the petitioner would submit that the High Court could exercise its jurisdiction even if there is availability of an alternate remedy, in the following three circumstances:

- (i) where the writ petition seeks enforcement of any of the fundamental rights;
- (ii) where there is failure of principles of natural justice; or
- (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

In support of his submissions he has relied on the judgment of the Apex Court in the case of *Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd. and others* reported in (2003) 2 SCC 107.

4. Learned Advocate for the respondent bank would, on the other hand, submits that the public money has been involved. The petitioner has defaulted on payment of the loan amount. The petitioner has an alternate remedy in the nature of appeal under DRT Act. He, therefore, urged for dismissal of the petition.

5. In the case of Harbanslal (supra), it has been held:

“The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.”

6. The writ petition dates back to 2017. In our view, the DRT did not have jurisdiction to grant recovery certificate and entertain consequential recovery proceedings. The order passed by the DRT granting recovery certificate is *non-est* confined in law, in view of Section 31-A of the Act of 1993 and therefore, we entertain the writ petition instead of relegating the petitioner to avail remedy of appeal.

7. Section 31-A (1) of the Act of 1993, reads thus:

"31-A. Power of Tribunal to issue certificate of recovery in case of decree or order.

(1) Where a decree or order was passed by any Court before the commencement of the Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000 and has not yet been executed, then, the decree-holder may apply to the Tribunal to pass an order for recovery of the amount.

(2)

(3)"

Aforesaid section was a subject of interpretation in writ petition No.1324 of 2013 (M/s Star Goat Farm and others Vs. IDBI Bank Ltd., and another), decided on 11-03-2014. The Division Bench of this court observed thus:

"7] On consideration of the provision quoted above, it is evident that the Tribunal is empowered to issue certificate of recovery in the event of compliance of two conditions. Firstly, the decree or order shall have to be passed by the Court before the commencement of the Recovery of Debts due to Banks and Financial Institutions (Amendment) Act, 2000 and secondly such a decree or order shall remain un-executed. Only in the event of satisfaction of both the requirements, it is permissible for the financial institution to approach the Tribunal and claim a certificate, as contemplated by Section 31-A of the Act of 1993."

8. In the case in hand the suit was filed in the year 2003 i.e. post introduction of Section 31-A in the Act of 1993. The decree therein has been passed thereafter in 2004. The aforesaid twin conditions thus do not get satisfied, and hence, the DRT, Aurangabad did not have jurisdiction to grant the

recovery certificate and entertain proceedings for recovery of the amount thereunder. It needs no mention that the order passed without jurisdiction is a nullity, such an order could be set up whenever and wherever it is sought to be enforced and relied upon.

9. Since the order granting recovery certificate is *non est* in law, the consequential proceedings for recovery of the amount are untenable. The interference, is therefore, called for with the impugned order. In the result, the writ petition succeeds in terms of the following order:

- (i) The recovery certificate issued in M. A. No.20 of 2006 by the DRT Aurangabad on 11-10-2006 and consequential recovery proceedings being Recovery Proceeding No.63 of 2006 are hereby quashed and set aside.
- (ii) Writ petition is disposed of. Rule is made absolute accordingly.

[R. G. AVACHAT, J.]

[SUNIL P. DESHMUKH, J.]

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