

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL CIVIL REVISION JURISDICTION**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**C.O. 1522 of 2021
Suman Bhattacharyya & Anr.
Vs.
Indian Bank & Ors.**

For the Petitioner : Mr. Joy Saha,
Mr. Saket Choudhary,
Ms. Jayshree Saha,
..... advocates

For the Opposite Party
No.1 & 2 :Mr. Om Narayan Rai,
Mr. Badal Singh,
.....advocates

For the Opposite Party
No.3 to 6 :Mr. Anubhav Sinha,
Mr. Sankar Kumar Samanta ...Advocates

Heard on : 22.09.2021

Judgment on : 07.10.2021

Hiranmay Bhattacharyya, J.:-

The petitioner has preferred the instant application under Article 227 of the Constitution of India challenging an order dated August 10, 2021 passed by the learned Chairperson, Debts Recovery Appellate Tribunal, Allahabad being the Chairperson-in-Charge of Debts Recovery Tribunal, Kolkata in Transfer Petition no. 1/2021/35 arising out of SA/539/2018 of DRT-3, Kolkata.

The petitioner being the borrower filed SA/539/2018 before the Debts Recovery Tribunal III challenging the proceedings initiated by the Bank under the SARFAESI Act. In connection with such proceeding the petitioner filed some interlocutory applications. The learned Tribunal by an order dated March 26, 2021 dismissed the SARFAESI application. Consequently, the interlocutory applications were also disposed of.

Challenging the procedure adopted by the learned Tribunal while dismissing the SARFAESI application, the petitioner filed an application under Article 227 of the Constitution of India which was registered as CO 923 of 2021. The said Civil Order was disposed of by setting aside the order dated March 26, 2021 passed by the learned Tribunal in SA No. 539 of 2018.

Thereafter, the writ petitioner approached the Appellate Tribunal by filing an application under Section 17A (2) of the Recovery of Debts due to Banks and Bankruptcy Act, 1993 praying for transfer of the entire records and proceedings of SA 539 of 2018 along with all pending interlocutory applications from the Debts Recovery Tribunal-III, Kolkata to Debts Recovery Tribunal -II, Kolkata.

The learned Appellate Tribunal by the order impugned rejected the said transfer application. Being aggrieved, the petitioner approached this Court with the present application under Article 227 of the Constitution of India.

Mr. Saha, the learned Senior Counsel for the petitioner contended that the learned Tribunal passed the order dated March 26, 2021 by totally disregarding the fact that the

interlocutory applications were fixed for hearing on April 6, 2021, April 7, 2021 and April 8, 2021 as Specially Fixed Matters. He contended that the said order was pronounced by the learned Presiding Officer of the Tribunal irrespective of the fact that the learned advocate of the petitioner appeared before the Tribunal on that date and drew the attention of the Presiding Officer to the fact that the SARFAESI application had not been heard and also that the hearing of the interlocutory applications has been fixed on subsequent dates. According to Mr. Saha, the procedure adopted by the Tribunal gave rise to an apprehension in the mind of the petitioner that the learned Presiding Officer is extremely biased against the petitioner and has already formed an opinion and made up his mind even without hearing this matter. Mr. Saha contended that in view of the scathing remarks made against the Presiding Officer in the order dated April 8, 2021 the petitioners have a genuine and bona fide apprehension that there may not be impartial disposal of the SARFAESI application. He, further, submitted that since DRT-II, Kolkata is having concurrent jurisdiction, no party will be put to any hardship if the prayer for transfer is allowed. He, further, submitted that such transfer is necessary as the same will instill confidence in the judicial process as it is well established that justice must not only be done but must also seem to be done. In course of argument Mr. Saha has also drawn the attention of the Court to the fact that the same Presiding Officer in the case of *Pat International and Ors. vs. Indian Overseas Bank and Ors.* also conducted the proceedings in an identical manner and a co-ordinate Bench by an order dated 29.06.2021 in C.O. No. 1203 of

2021 was pleased to set aside the order passed by the Tribunal and remanded the matter with a direction that the SARFAESI application as well as the interlocutory applications are to be heard and disposed of by a different Presiding Officer. In support of the proposition that justice must not only be done but must also seem to be done, Mr. Saha placed reliance on the following decisions:

(a) *Justice P.D. Dinakaran vs. Hon'ble Justice Enquiry Committee and others-* AIR 2011 SC Page 3711 paragraphs 25, 26, 28, 43 to 52.

(b) *Rupendra Deb Raikut vs. Ashrumati Devi* – AIR 1951 Calcutta, Page 286, Paragraphs 22, 71, 72, 74 to 76

Thus, Mr. Saha submitted that since the DRT II is the only alternative bench available at present the instant matter may be transferred to the said Presiding Officer for disposal as has been directed by a co-ordinate bench in *Pat International* (supra).

Mr. Om Narayan Rai, learned advocate for the bank/opposite party no. 1 and 2 herein contended that in the earlier application under Article 227 of the Constitution of India being CO 923 of 2021 the petitioner prayed for transfer of the instant SARFAESI application from the Debts Recovery Tribunal III, Kolkata to Debts Recovery Tribunal II, Kolkata. He, further, submitted that the petitioner herein in the earlier Civil Order made similar allegations against the learned Presiding Officer in support of their prayer for transfer. He submitted that such prayer being not expressly allowed shall be deemed to have been considered and rejected by a Co-ordinate Bench and as such the

present application is barred by the principles of constructive res judicata. He, further, contended that when the petitioners have not urged that the Presiding Officer had personal or pecuniary bias against the petitioners, the learned Appellate Tribunal was justified in rejecting the prayer for transfer. He, further, submitted that if the SARFAESI application and the pending interlocutory applications are transferred at this stage to any other Presiding Officer the matter would be unduly delayed causing serious prejudice to the Bank.

Mr. Sinha, the learned advocate for the opposite party 3-6 submitted that the scope of judicial review under Article 227 of the Constitution of India is very limited and the High Court can exercise the power of judicial review only in case the finding of facts recorded by the authority is perverse or patently erroneous or the same is beyond the scope of the materials on record. He, further, submitted that in the absence of any pleading as to the pecuniary bias, personal bias or official bias it cannot be said that the learned Presiding Officer of DRT III exhibited any form of the aforesaid forms of bias. He, further, submitted that the petitioners were unable to demonstrate that there was real likelihood or apprehension of bias in the instant case. He also submitted that the instant Civil Order is barred by the principles of *res judicata*.

By relying upon the judgment in the case of *Supreme Court Advocates-on-Record Assn. (Recusal Matter) v. Union of India (Recusal Matter)*, reported in (2016)5 SCC 808 he submitted that since in the instant case it cannot be said that the Presiding

Officer DRT III is disqualified on the ground of any form of bias as laid down in the said decision, the instant transfer petition was rightly rejected by the learned Appellate Tribunal. He, further, submitted that if the request for refusal are acceded for the mere asking it will destroy the entire judicial system. In support of such contention Mr. Sinha relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Indore Development Authority vs. Manohar Lal and Ors.* reported at (2020) 6 SCC 304.

I have heard the learned advocates for the parties and have perused the materials on record.

Since the learned advocates for the opposite parties have raised objections against the maintainability of the instant application on the ground that the prayer for transfer is barred by the principles of constructive *res judicata*, this Court shall deal with such issue prior to deciding the other issues.

The order dated March 26, 2021 passed by the learned Debts Recovery Tribunal-III, Kolkata in SA No. 539 of 2018 was assailed by the petitioner herein by preferring a Civil Order no. 923 of 2021. A copy of the said Civil Order was produced by the learned advocate for the opposite party. The pleadings in paragraph 18, 19 and 21 are relevant for the purpose of deciding the point of maintainability and as such the same are reproduced herein below:

“18. The petitioners pray that the manner and style the Learned Debts Recovery Tribunal-III, Kolkata below has conducted the legal proceedings of S.A. No. 539 of 2018 (Suman Bhattacharyya and Another Versus Indian Bank and Others) in pre-determined

approach, the petitioners has a reasonable doubt and apprehension that such utter violation of principle of natural justice and pronouncement of illegal order may reoccur.

19. That element of biasness and prejudice cannot be out-ruled, hence the petitioners most respectfully pray for the transfer of the entire proceedings of S.A. No. 539 of 2018 (Suman Bhattacharyya and Another Versus Indian Bank and Others) from the Learned Debts Recovery Tribunal-III, Kolkata to the Learned Debts Recovery Tribunal-II, Kolkata so that the due justice could be administered by following the principles of natural justice. The proceeding of the Learned Debts Recovery Tribunal- I, Kolkata is been conducted by the same Learned Presiding Officer, DRT-III, Kolkata, who is in charge of DRT-I, Kolkata. Thus, the only option available to the petitioners are to seek transfer of the matter is to the Learned Debts Recovery Tribunal-II, Kolkata, in terms with the provisions of Section 24 of the Code of Civil Procedure, 1908 to be read with Section 17A(2) of the Recovery of Debts due to Bank and Bankruptcy Act, 1993.

21. The petitioners submit that they do not have any alternative and efficacious remedy before any other judicial forum or Courts of Law save and except before this Hon'ble Court which exercises the supervisory jurisdiction over all the subordinate courts and tribunals of the state under Article 227 of the Constitution of India for the administration of justice and avoidance of any illegality, pre-determined approach as well as arbitrary practice and procedure by the subordinate courts and tribunals, if found to be

functioned in contrary to the settled provisions of laws, practice, procedure and the principle of natural justice.”

On the basis of the aforesaid pleadings the petitioner prayed for the following relief:-

“In the premises, your petitioners most humbly prays that Your Lordship may graciously be pleased to issue a Rule calling upon the opposite parties to show cause as to why the hearing of S.A. No. 539 of 2018 (Suman Bhattacharyya and Another Versus Indian Bank and Others) should not be re-opened by setting aside the illegal order and judgment dated 26th March, 2021 passed by the Learned Presiding Officer, Debts Recovery Tribunal-III, Kolkata and further the entire proceedings of S.A. No. 539 of 2018 (Suman Bhattacharyya and Another Versus Indian Bank and Others) should not be transferred from the Learned Debts Recovery Tribunal- III, Kolkata to Learned Debts Recovery Tribunal-II, Kolkata for proper hearing in accordance with the available facts and applicable laws;”

Thus, it is evident from the pleadings and the reliefs claimed in the CO No. 923 of 2021 that the petitioner prayed for transfer of the SARFAESI application from DRT III, Kolkata to DRT II, Kolkata on the ground that the learned Presiding Officer has conducted the proceedings in a predetermined approach for which a reasonable doubt and apprehension have been raised in the mind of the petitioner that such utter violation of the principle of natural justice and pronouncement of illegal order may recur.

A Co-ordinate Bench by an order dated April 8, 2021 disposed of the Civil Order no. 923 of 2021 by passing the following order :

“Under such circumstances, the order impugned does not have any legs to stand. The order impugned is set aside and quashed. The parties are relegated to the learned Tribunal for hearing of S.A. 539 of 2018 along with all pending interlocutory application. The learned court below is directed to hear out the applications and the S.A. preferably within two months from the date of communication of this order.

It s made clear that the parties will not be allowed any unnecessary adjournments. The learned Tribunal shall proceed in accordance with law upon giving adequate opportunity to the parties to place their case.

The Court has not gone into the merits of the claim of the petitioners and the learned Tribunal shall decide the matter independently and in accordance with law.

The revisional application is disposed of.

There will be, however, no order as to costs.”

On the issue of *res judicata*, Mr. Saha, the learned Senior Counsel for the petitioner contended that since Section 17A (2) of the Recovery of Debts due to Banks and Bankruptcy Act, 1993 gives a right to a party to pray for transfer of the proceedings from one Tribunal to the other, the right of the petitioner to approach the appellate Tribunal with a prayer for transfer cannot be said to be barred by *res judicata* only the ground that the co-ordinate bench did not direct transfer of the SARFAESI application.

Upon a meaningful reading of the application under Article 227 of the Constitution of India being CO no. 923 of 2021 it appears that the petitioner herein specifically pleaded the grounds for transfer of the SARFAESI application from DRT III, Kolkata to DRT II, Kolkata and a specific prayer to that effect was

also made. The relief claimed by the petitioner herein in the earlier Civil Order for transfer was not expressly granted by the Co-ordinate Bench in the order dated April 8, 2021. On the other hand, the Co-ordinate Bench relegated the parties to the learned Tribunal for hearing of the SARFAESI application along with all pending interlocutory applications with a direction to hear them within a specified time frame. Immediately, thereafter, the petitioner filed the transfer application before the learned appellate Tribunal.

It was the specific stand of the petitioner herein in CO 923 of 2021 that the transfer can be sought under the provisions of Section 24 of the Code of Civil Procedure read with Section 17A(2) of the 1993 Act and the High Court under Article 227 of the Constitution of India can entertain, hear and grant such relief. After taking such stand in CO 923 of 2021 and when the prayer for transfer was not expressly granted by the Co-ordinate Bench the prayer for transfer made before the learned Appellate Tribunal, in the considered view of this Court is barred by the principles of constructive *res judicata* as it is well settled that the principles of *res judicata* is applicable not only in the subsequent proceeding but also in the subsequent stages of the same proceeding.

For the reasons as aforesaid this Court is of the considered view that the prayer for transfer of the SARFAESI application and the connected interlocutory applications is barred by the principles of *res judicata* and the same cannot be reopened by the petitioner in the subsequent proceedings before the appellate

Tribunal once such prayer was not expressly allowed by this Court in C.O. 923 of 2021.

Mr. Saha, learned Senior Counsel for the petitioner tried to impress upon this Court that the instant SARFAESI application of the petitioner herein should be transferred taking note of an order dated June 29, 2021 passed by another Co-ordinate Bench in CO 1203 of 2021 (*Pat International and Ors. vs. Indian Overseas Bank and Ors*) wherein a Co-ordinate Bench directed the SARFAESI application in that case to be heard by a different Presiding Officer.

It appears that a Co-ordinate Bench in *Pat International* (supra) observed that the Court cannot repose faith on the Presiding Officer as far as the hearing of the SARFAESI application which was the subject matter of the said Civil Order. However, in the instant case it appears that in spite of a specific prayer for transfer made by the petitioner on an earlier occasion the Co-ordinate Bench directed the said learned Tribunal to hear the SARFAESI application along with all pending interlocutory applications. Thus, in the instant case the submission of Mr. Saha that the instant SARFAESI application is to be transferred to DRT II, Kolkata cannot be accepted for the reasons as stated herein before.

Since the issue of maintainability is decided against the petitioner for the findings recorded hereinabove I do not deem necessary to decide the other issues raised in the instant application. The other judgments cited at the Bar are in support

of their respective submissions with regard to issues other than *res judicata* and as such the same are not dealt with.

CO no. 1522 of 2021 accordingly stands dismissed. There shall be, however, no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)