

DRT – A COURT OF CIVIL MATTERS YET NOT A CIVIL COURT

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I. INTRODUCTION

The Debts Recovery Tribunal (“DRT”), is the outcome of a unique, self empowered enactment. What is so interesting about this Tribunal is that only Banks, Financial institutions are entitled to initiate a proceeding and invoke its jurisdiction (i.e., only one party to the dispute). Borrowers are placed in a seemingly disadvantaged position in terms of seeking remedy, and are even barred from using an alternative forum. The question of constitutionality to this effect has also been raised and challenged earlier. In the light of recently decided cases, the legal position seems to have become clearer with respect to remedies available with a borrower and conflicting jurisdictional powers of civil courts and the DRT.¹

The DRT was set up for expeditious recovery of debts,² it is entitled to pass such orders and grant such remedies as may be granted by a civil court A bare perusal of the sections of the Act, makes it clear that any action for which DRT is the forum for adjudication of a dispute, can be tried only by it since jurisdiction of courts and authorities is expressly barred. However, time and again its jurisdiction and power to try and provide adequate remedies has been questioned. Courts have curtailed its jurisdiction in matters relating to detailed trial for misrepresentation and fraud. At a different occasion it has been held that DRT can issue a certificate only for recovery of

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¹A.I.R. 1997 Del 355(India), DRT is not a court, it exercises powers of a civil court only in respect of limited matters.2009 (8) S.C.C. 646, we have held that the Tribunals are neither civil courts nor courts subordinate to the High Court.

²Shri T. Tiwari Committee, 1981 as also recognized in 2009 (8) S.C.C. 646(India).

dues of a bank, it cannot pass a decree thereby providing a level ground to the courts as against the DRT in similar nature of matters. Raging conflict that has been haunting the courts for a long time is that whether a borrower can approach a court independent of a proceeding initiated or to be initiated by the bank under the DRT Act, and, if so, under what circumstances? Existing provisions of the Act prima facie give the impression that they do not provide a right to the borrower to approach the DRT. If the borrower has approached the court (not DRT) and, simultaneously, the bank has approached the DRT to recover its dues, does the Act require such suits to be compulsorily transferred to the DRT, or can independent and parallel proceedings continue? This write up analyses the legal position, whether the borrowers must accept this imposed remedy (of being part of the Bank's application at DRT) or they are entitled to an alternate forum of civil courts along with a right to institute an independent suit in the tribunal.

II. PROVISIONS EMPOWERING THE DEBT RECOVERY TRIBUNAL

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for some very powerful and authoritative provisions, beefing up the muscles of DRT to the extent that it springboards a series of conflicting cases struggling to determine the scope of play for other available forums. Section 17³ of the Act deals with jurisdiction, of the Tribunal from the date of its appointment and has been vested with power and authority to decide applications made by Banks and Financial Institutions, for recovery of debts due to them. "Debt" is

³Jurisdiction, powers and authority of Tribunals. — (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

defined very widely under section 2(g)⁴ of the Act; it is wide in the sense that it incorporates *any liability* which is claimed as due by a bank during the course of its business activity. Thus, the jurisdiction of the DRT extends not just to debts as traditionally understood, but to *any claim of money* that a bank makes during the course of business e.g., claim arising out of a derivative transaction,⁵ mortgage as security claim,⁶ etc.

Further section 18 provides for an extensive bar on jurisdiction of other courts. It provides that, on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17. This has been the major stimulus responsible for stirring debate of validity and extent of civil court's jurisdiction in matters of similar nature. Looking at the wide and express provisions of the Act, the indication is amply clear that this Act is meant to provide for expeditious adjudication and recovery of debts due-to banks and financial institutions⁷, to that extent it's a positive legislation but at the same time the Act presumes the borrower to be at fault and not only curtails his rights to get remedied through a civil court but also devoids it of right to initiate an independent suit against the Financial Institutions, which is in grave violation of principle of Natural Justice.

⁴“debt” means any liability (inclusive of interest) which is claimed as due from any person by a bank of a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

⁵Rajshree Sugars & Chemicals v. Axis Bank Ltd., 2009 (1) C.T.C. 227(India).

⁶Mardia Chemicals Ltd. v. Union of India (UOI) and Ors, 2004 (4) S.C.C. 311(India).

⁷Virendra Singh Rawat, *Banks Want Faster Disposal of DRT Cases*, BUSINESS STANDARD, Mar. 27, 2008.

Section 19 related to the procedure of Tribunal, in regard to filing of applications. Section 19, as it originally stood, was substituted in entirety by Act 1 of 2000. Sub-section (1) of Section 19 provides that a Bank or financial institution can make an application to jurisdictional Debt Recovery Tribunal. Sub-sections (6) to (11) of new Section 19, is relevant for our purpose.

Section 19(6), where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

Section 19(7), the written statement shall have the same effect as a plaint in a cross- suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

Section 19(9), a counter-claim shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

Section 19(11) entitles a Bank to contend before the DRT that the claim made by the borrower should not be disposed of by way of counter claim, but should be tried only as an independent action. If such a contention is raised by the Bank in an application taken out before issues are settled in relation to the counter claim, then the Tribunal is entitled to pass an order.

Unfortunately, after having conferred a right upon the Bank to oppose the claim of a borrower from being treated as a counter claim and after having conferred discretion upon the Tribunal to treat such a claim as an independent action, Section 19 is silent as to what would happen next. If the claim made by a borrower in an application before the DRT is chosen not to be treated as a counter claim but to be treated only as an independent action, the very maintainability of such an independent action, may be in jeopardy, on account of the fact that Section 19(1) enables only a Bank or Financial Institution to file an

application before the Tribunal. But if the counter claim is treated as an independent action, the borrower would become the applicant. To this also extent, there is no clarity in the Act.

In the landmark and among first of the series of cases in this dispute *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. and Ors*⁸, Hon'ble Supreme Court held that an independent suit of a borrower (against the Bank's application) should be deemed to be a counter claim and be transferred to the Debt Recovery Tribunal, subject to meeting of certain conditions thereby limiting and restricting any scope of an independent proceeding for the borrower.

A. Constitutionality of the provisions

The Debts Due to Banks and Financial Institutions Act, 1993 in section 17 provides for 'Jurisdiction of the Debt Recovery Tribunal', which is very limited and restricted, in the sense that it vests tribunal with the power and authority to entertain applications only from banks and financial institutions. Borrowers have no scope of approaching the Tribunal in the first place, and can be forced to accept a joint trial once the bank or the financial institution approaches the tribunal. The summary procedure provided in the Act provides for an expeditious recovery of debt without considering the cause since the Tribunal is not permitted to entertain any claim of the borrower against the Bank or Financial Institution.

The Act, also provides the lender recourse to a summary trial against the borrower while no such proportionate relief is available to the borrowers. This amounts to an unequal treatment to one of the two parties to the same transaction. State has made a law that takes away protection of the normal legal construct and deprives of a fair opportunity of representation available to all citizens, this inequality raises doubt of serious nature and questions the consideration of 'Justice' as enshrined in the Constitution.

Further the Act provides that a borrower shall be able to prefer an

⁸A.I.R. 2000 SC 2957(India).

appeal against the order of the Tribunal only if⁹ the borrower has deposited seventy five per cent of the debt due as determined by the Tribunal, within the limitation period of the receipt of the order of the Tribunal. The Act completely ignores that a commercial transaction involves two persons - lender and borrower, law must treat both as equal. Right to be treated with equality is provided as a Fundamental Right by the Constitution and that the equality before law provided under Article 14 is not confined to individuals only. It extends to all persons including legal persons like Banks,¹⁰ Companies, Financial Corporations, Private Companies, other Authorities,¹¹ etc.

B. Dispute regarding jurisdiction of DRT & civil courts

Legal position has remained unclear as to whether a borrower in such a dispute of debt due to Financial Institutions, is entitled to an alternate civil remedy which he can initiate himself (for instance an independent suit in civil court as against a counterclaim to Financial Institution's application) or the remedy lies only with Debt Recovery Tribunal which can be initiated exclusively by Financial Institutions. Is it that the remedy available with DRT completely ousts jurisdiction of civil court? If latter is the case, then this position has not been made clear with catena of cases as have been decided over the last decade till recently the Nahar Industrial case which has been decided by Supreme Court.

In the list of important cases *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. and Ors*¹², comes first, the question raised in this case was whether the borrower's suit should be transferred to the

⁹Deposit of amount of debt due, on filing appeal.—Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19.

¹⁰A.I.R. 2003 SC 858(India).

¹¹A.I.R. 1981 SC 487(India).

¹²A.I.R. 2000 SC 2957(India).

Tribunal by treating the independent suit of the borrower as a counter-claim in the application of the Bank. The Apex Court decided that an independent suit can be transferred to the Tribunal if it can be established that the subject-matter of the borrower's suit pending before the Court, and the Bank's application pending before the Tribunal are inextricably connected. In this case the additional quotient was that the case was decided under Article 142 which only Supreme Court can invoke, meaning thereby that this case could not be used under Article 141, as a precedent for subsequent cases to be decided accordingly by lower courts.

In the *Indian Bank v. ABS Marine Products Pvt. Ltd.*,¹³ the question was similar, the case of *Abhijeet Tea* was discussed and distinguished. Question discussed in detail was:

Whether the provisions of Debts Recovery Act mandate or require the transfer of an independent suit filed by a borrower against a Bank before a civil court to the Tribunal, in the event of the Bank filing a recovery application against the borrower before the Tribunal, to be tried as a counter-claim in the Bank's application?

Supreme Court, here, held that it is not necessary for a borrower to file a counter-claim in the same application for recovery of money filed by the bank before the Tribunal and that a borrower is well entitled to file an independent suit before a Civil Court for damages. Such a suit was also held to be not liable to be transferred to the Tribunal against the wishes of the borrower, when on facts, they were not inextricably connected. *Abhijit Tea* was clarified to the effect that where the respective claims of the parties were not inextricably connected, the transfer of a suit to the Tribunal can be only on the basis of consent of the parties and not otherwise.

In the said judgment the Apex Court also held that:

“the jurisdiction of Civil Courts is not barred in regard to any suit filed by a borrower or any other

¹³A.I.R. 2006 SC 1899(India).

person against a bank for any relief¹⁴."

Further the law on the point was made clearer, court observed:

"What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of Civil Courts barred in respect of such suits or proceedings."

*State Bank of India v. Ranjan Chemicals Ltd and Anr.*¹⁴ is the next big decision in this line, primarily arising out of the refusal of a Civil Court to transfer a suit filed by the borrower, to the Tribunal for being tried jointly with an application of the bank pending before the Tribunal. It was observed in the said decision that in both the proceedings, the rights and liabilities of parties arose out of the same transaction and that the same basic evidence was to be taken in both cases. Subsequently at the appellate stage in Supreme Court, it was decided that the matter be transferred to the DRT for joint trial without having the need to take consent of the borrower, under the inherent power of the Court relying on Section 151 of the Code of Civil Procedure, 1908. It is not possible to accept the argument that every time the Court transfers a suit to another court or orders a joint trial, it has to have the consent of the parties. A Court has the power in an appropriate case to transfer a suit for being tried with another if the circumstances warranted and justified it. Therefore, ultimately the Court has to consider whether in the facts and circumstances of the case the joint trial is necessary. This decision was followed in *Industrial Investment Bank of India v. Marshal's Power and Telecom (I) Ltd*¹⁵ case.

On the point of consent of the parties, *Indian Ban case* and *State Bank of India case* are opposite to each other. The difficulty that arose was

¹⁴2007 (2) M.L.J. 787(India).

¹⁵2007 (2) M.L.J. 796(India).

that both the judgments, were from the Bench of equal strength of the Apex Court. As a result of this what followed from these conflicting decisions is that in subsequent cases Borrowers relied upon *Abhijit Tea Co. case* along with ABS Marine Products' case and submitted that the suit of the Plaintiff cannot be transferred to the Debt Recovery Tribunal, while the Financial Institutions relied upon *Abhijit Tea Co., (P) Ltd along with Ranjan Chemicals Ltd and Anr.*, and submitted that under the inherent powers the suit in question can be transferred to the Debt Recovery Tribunal.

C. Uncertainty and Borrower's Confusion

The confusion of position sprouting from the initial court rulings (as mentioned earlier) were earlier believed to be judgments that cannot be pulled together to harmonise the long rattled judicial approach and therefore the court will have to select one of the conflicting views for deciding future matters on similar lines, however under these circumstances if the Court moves out of traditional *modus operandi* and device a larger remedy, the position certainly gets settled.

On the one side there is a convenience that the matter be decided in one forum and on the other hand there is a prejudice to one party losing an opportunity of full-fledged proceeding under the Code of Civil Procedure (1908), and that too without its consent. Supreme Court has stressed that the power to transfer a proceeding is inherent in the Civil Court under Section 151 of the Code of Civil Procedure, however the power inherent in the Court on well accepted principles to order a joint proceeding does not depend upon the volition of the parties but it depends upon the convenience of trial, saving of time, limiting expenses and avoidance of duplicating at least a part of the evidence. Further, a joint proceeding is ordered when a Court finds that such a proceeding, would avoid separate overlapping evidence being taken in the two causes put in suit and will be more convenient to try them together in the interest of the parties and in the interest of an effective trial of the causes. This is vested in the Court as an inherent power.

Power to transfer the suit to Debt Recovery Tribunal, has to be exercised in the interest of justice, Supreme court finds that so far as the *Abhijit Tea Co. case* and *ABS Marine Products'* case has been explained on the point of consent, it is settled and is made amply clear in the *State Bank of India case* i.e., the requirement to obtain consent of both the parties before transfer of the suit is not to be given priority while exercising the inherent power of the civil court, especially when the cause of action is inextricably connected i.e. liabilities arose of same transaction and/or requirement of similar evidence.

The debate is taken further by the decision of *Vakrangee Softwares Limited v. Central Bank of India*¹⁶, the borrower here had already filed a suit for misrepresentation with the civil court. Court moves a step ahead in deciding the raging debate between Inherent Power of Civil Court and obtaining consent of the Parties. Court observes that when there is a conflict of decisions from the Supreme Court, it is very painful to make a choice of a judgment out of the two. Full bench of the Apex Court relies on the matter of *Kamlesh Ishwardas Patel v. Union of India and Ors.*¹⁷

The question is now centred around the point that out of the two remedies, one which is larger remedy available in Civil Court to decide the point in issue, and the other speedy and summary remedy available before the Debt Recovery Tribunal, which remedy should be selected by the parties. Court finds that the borrower is justified in selecting Civil Court where a full-fledged trial of the issue in respect of misrepresentation can be properly dealt. Therefore, it will be in the interest of the Plaintiff, who has chosen the forum to keep the suit in civil Court. Court did not deem it fit to disturb the advantageous position which the Plaintiff had acquired as a result of filing of the suit in civil Court. If the suit is to be transferred without the consent of the borrower, he was to lose the larger remedy and the Bank gets saved from a rigorous civil proceeding which was not in the interest

¹⁶2009(1) Bom CR 657(India).

¹⁷1994 M. L. J. 1669(India).

of justice. Hence, the civil Court may have inherent powers under Section 151 of the Code of Civil Procedure, 1908, the test laid down and explained in *ABS Marine* by making reference to the decision in *Abhijit Tea Co.* case and more specifically to Article 142 of the Constitution of India, etc., found acceptable. Finally, since the borrower had not been consenting to transfer his suit to the Debt Recovery Tribunal, High Court declined to transfer the suit to the DRT.

Even in cases where the transaction between a Bank and its customer is one of mere lending and borrowing, it is not as though a Civil suit at the instance of the borrower is barred, in all contingencies, without exception. Supreme Court in *Mardia Chemicals* held that, to a very limited extent jurisdiction of the civil court can be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.¹⁸

In this regard one can take cue from the ratio in *ABS Marine* that was not expressly overruled by any subsequent decision. It can be clearly inferred that a civil suit is maintainable. Subsequent independent suits filed in the Civil Courts have not been thrown out as not maintainable. They were only transferred to the Tribunals for being treated as set off or counter claim and for being tried along with an application of the Bank. Another question that remains unsettled is, whether the civil suit is liable to be transferred to the Tribunal after an application is filed by the Bank before it.

D. Dispute settled with recent supreme court ruling

***a) Nahar Industrial Enterprises Ltd. V. Hong Kong and Shanghai Banking Corporation*¹⁹**

¹⁸A.I.R. 2004 SC 2371(India).

¹⁹2009 (8) S.C.C. 646(India).

Facts of the case in brief:

Appellant entered into International Swaps and Derivatives Agreement with the Respondent. Appellant filed a suit in the Civil Court at Ludhiana seeking a declaration that contracts entered into by and between them were void as being illegal and against public policy. An application for grant of injunction was also filed. Respondent, filed transfer application before the High Court of Punjab & Haryana seeking transfer of proceedings pending before the Civil Judge, Ludhiana to the Debts Recovery Tribunal, III, Mumbai.

Issues raised, for our purposes:

Whether the High Court/Supreme Court has the power to transfer a suit from a Civil Court to the DRT?

Whether the decision of this Court in Indian Bank v. ABS Marine is applicable in the case of transfer of a suit from the Civil Court to the DRT to be tried as a counterclaim, and could a Coordinate Two Judge Bench in Ranjan Chemicals have departed from the ratio thereof after noticing it and without referring the matter to a larger bench of Three Judges?

Supreme Court made distinction between DRT and a Civil Court with respect to their overlapping jurisdictional ambit, court observed that, if the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the Bank or Financial Institution to approach it first. The continuance of its counter-claim is entirely dependent on the continuance of the applications filed by the Bank. Before it no declaratory relief can be sought for, by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counter-claim.

In a proceeding before the Debt Recovery Tribunal, detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not

be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debt Recovery Tribunal centres round the legally recoverable dues of the bank.²⁰ Only because a court or a tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it is a civil court.

Supreme Court held that no independent proceedings can be initiated by a debtor before DRT. Jurisdiction of civil court is barred only in respect of matters which strictly come within the purview of Section 17 of DRT Act and not beyond the same.

With respect to statutory provisions contained in sections 17 & 18 of DRT Act, it cannot be said to have ousted the jurisdiction of the civil court qua the suits filed by the debtor, the jurisdiction of the civil court is barred in relation only to the applications from the bank or recovery of debts due to such bank, even a set off or a counter claim permitted to be raised under sub Sections 6 - 11 of Section 19 of the DRT Act can be lodged only if the proceedings have been initiated by a bank; such set off or counter claim can also be directed to be instituted in civil court on an application of the bank.

On a concluding note court held that the jurisdiction of a civil court is pre-emptive in nature i.e., unless the same is ousted expressly or by necessary indication it will have jurisdiction to try all types of suits.

III. CONCLUSIONS

The role of the Debt Recovery Tribunal has been the subject of a great deal of controversy, the main question has been whether an independent suit filed by a borrower against a bank in a civil court could be transferred to the DRT as a “*counterclaim*” against his wishes. The law on the point was uncertain, with several conflicting judgments.

²⁰2005 S.C.C. OnLine Ker 49(India).

Recently Supreme Court put the controversy to rest with a comprehensive and well-reasoned judgment in *Nahar Industrial Enterprises Ltd. v. HSBC*. The case concerned several appeals that had been filed against decisions of various High Courts on this question. Some had held that an independent suit was not barred, while others had held that it was, and transferred it to the appropriate DRT. The two main, and conflicting decisions on the point prior to *Nahar* were *Indian Bank v. ABS Marine Products* (2006) 5 SCC 72, and *SBI v. Ranjan Chemicals Ltd.* (2007) 1 SCC 97. *ABS Marine* had held that an independent suit cannot be transferred without the consent of the borrower even if it inextricably connected with the bank's suit and is in the nature of a counter claim. *Ranjan Chemicals* had held that the consent of the parties is not a limitation on the power of the court to order a transfer. In *Nahar*, the Supreme Court held that *Ranjan Chemicals* could not have departed from the law laid down in *ABS Marine*, as it was a decision of a coordinate Bench. The Court also agreed with the reasoning that a DRT is incapable of adjudicating complex issues of law and fact.

A Tribunal that has the "trappings" of a court is not necessarily a court, and approved decisions have held that DRT is not a court. Moreover, the DRT cannot issue a decree, but only a recovery certificate. Although a DRT is empowered to take evidence in a detailed manner, the Court observed that its function is intended to make this the exception and not the rule. Thus, the position is that the DRT is not a civil court for the purposes of Sections 23, 24 and 25 of the CPC. Nor is it subordinate to the High Court.

A debtor under the common law of contract as also in terms of the loan agreement may have an independent right but until now no such forum has been created for endorsement of that right.

"Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 and the Civil Court, therefore, will continue to have jurisdiction."