

**DID THE SUPREME COURT IN NAHAR INDUSTRIAL ENTERPRISES LTD. V. HSBC AND AXIS BANK LTD. V. RAJSHREE SUGARS & CHEMICALS LTD. OVERRULE MADRAS HIGH COURT JUDGMENT IN RAJSHREE SUGARS & CHEMICALS LTD. V. AXIS BANK LTD. ?**

**By – B. Gopalakrishnan\***

There has been a feeling amongst certain sections of businessmen and some lawyers that the Judgment of the Hon'ble Supreme Court in Nahar Industrial Enterprises Ltd. v. HSBC and Axis Bank Ltd. v. Rajshree Sugars & Chemicals Ltd.<sup>1</sup> has over turned the Judgment passed by the Single Judge Bench of Madras High Court in Rajshree Sugars & Chemicals Ltd. v. Axis Bank Ltd.<sup>2</sup> This article is aimed at pointing out the fact that the Judgment of the Hon'ble Supreme Court does not at any point of time has either reversed or dealt with the factual details or on the merits of the Judgment passed by the Single Judge Bench of Madras High Court which is challenged by the aggrieved party and is presently pending before the Division Bench of the Madras High Court.

The Hon'ble Single Judge Bench of Madras High Court while passing the Judgment has dealt extensively on merits and has held that the contract entered into by and between the said company and the Bank is not a void or voidable contract nor was it considered to involve any kind of fraud in the said derivative contracts. The ratio of the above Judgment is applicable to all other pending cases whose facts are similar in nature. This is more so as all the petitions filed by Corporates against their respective Banks contains more or less the same plea.

Hon'ble Single Judge of Madras High Court while deciding the case has also held that the amount due from the said company to the Bank by virtue of the derivative contract falls within the term 'debt' as defined under Section 2(g) of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI) and therefore the Bank has a right of taking such necessary action in accordance with the accepted and recognized process of law. The effect of this finding is that the Banks were at liberty to approach Debt Recovery Tribunal (DRT) which is a right forum for the Bank to claim amount due to the Bank from the borrower. For the sake of clarity, we reproduce herein below Para 25 of the said Judgment:

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<sup>1</sup> (2009) (10) SCALE 360

<sup>2</sup> (2008) 8 MLJ 261

*25. Transactions in derivatives, fall within the category of "business activity undertaken by the Bank" as they are covered by Section 6(1) of the Banking Regulation Act, 1949. Therefore I have no difficulty in coming to the conclusion that if the transaction in question gives rise to a claim by the Bank, of any liability, on the part of the plaintiff, the defendant-Bank may certainly be able to invoke the provisions of RDDBFI Act. Since the word "debt" is defined to include any claim arising out of the business activity of the bank, it is not necessary that only in those cases where there is an act of lending and borrowing that the provisions of RDDBFI Act could be invoked by the Bank.*

The Banks in question were forced to approach the Hon'ble Supreme Court for a request to transfer because even though the High Court has held that the contract is valid and that the amount due in terms of the Contract is a debt as defined under the RDDBFI Act and has also held that the Banks are free to approach their respective forum for recovery of their dues, it did not per se transferred the suit to the DRT. Para no.32 reads as under:

*32. It is seen from all the cases that followed ABS Marine that the ratio in ABS Marine was not expressly overruled by any subsequent decision. Therefore, it is clear that a civil suit is maintainable. But the question as to whether the civil suit is liable to be transferred to the Tribunal after an application is filed by the Bank before the Tribunal (in the light of the ratio laid down in Ranjan Chemicals case and Marshal's Power case), is actually premature at this stage, since the Bank has not filed any application before the DRT as on date.*

Accordingly, the Banks had filed a petition before the DRT and the same is pending. Subsequent to this, the Banks had moved to Hon'ble Supreme Court for transfer of the existing suit which is pending before the Hon'ble High Court of Madras to Mumbai DRT. The Bank had to approach Supreme Court because the High Court in question did not have any power/jurisdiction to transfer a suit pending in a Civil Court, which is subordinate to it, to a Tribunal which is not subordinate to that High Court. This is

evidenced by the Hon'ble Supreme Court Judgment in Durgesh Sharma v. Jayshree<sup>3</sup>.

Therefore, what was actually agitated by the Banks before the Hon'ble Supreme Court was only the question to transfer the existing suits pending in the various High Courts, Civil Courts and other fora to the appropriate DRT's. Specifically, the Banks only filed transfer petitions before the Hon'ble Supreme Court and there was absolutely no question of any mention of the Madras High Court case before the Hon'ble Supreme Court for requesting it to be decided on merits.

The Hon'ble Supreme Court in its wisdom referred various case laws regarding such transfer of petitions from one court to another especially in the case of DRT by virtue of the provision of section 17, 18 and 19 of the RDDBFI Act. The Hon'ble Supreme Court held that the instant case was not a fit case to be transferred to the DRT for various reasons stated therein. We are not going into the legality of those findings. However, the Hon'ble Supreme Court concluded the Judgment as under:

*DIRECTIONS*

*However, we make it clear that having regard to the pleadings of the parties as also the purpose and object for which the DRT has been constituted, it should proceed to dispose of the bank's claims expeditiously. We, however, have no doubt whatsoever in our mind that while determining the respective claims of the parties and the nature thereof, the DRT shall comply with all the requirements of law. We, therefore, are of the opinion that the transfer applications have no merit. They are dismissed accordingly with the aforementioned observations.*

The effect of this Judgment is that the Hon'ble Supreme Court has directed Mumbai DRT where such cases have been filed by Banks, to proceed with the case and expeditiously dispose it of in accordance with the merits of the case.

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<sup>3</sup> (2008) 9 SCC 648

Under these circumstances, the worst thing which can happen is only the parallel proceedings before the two forums on the same issue one, being the DRT and the other being the Civil Court. Therefore, it is very crystal clear that Hon'ble Supreme Court has not overruled the Judgment of the Single Judge Bench of the Madras High Court at any point of time either on merits or on facts or on the questions of Law.

The question as to whether the Hon'ble Supreme Court Judgment with relation to the transfer petition is fair or good Judgment or not is altogether a separate issue. However, the larger question as to whether the co-ordinate bench of the Supreme Court can overrule the Judgment passed by another co-ordinate bench of the Supreme Court or not can only be decided by a larger bench of the Hon'ble Supreme Court.

Our intention in this article is only limited to bring out the clarity on the fact that the Hon'ble Supreme Court has not over turned the Judgment of Rajshree Sugars as passed by the Madras High Court Single Bench. Needless to point out that the aggrieved party has also approached; against the Judgment of the Single Bench, by appeal to the Division Bench of the Madras High Court and the matter is still pending there. In view of the directions given by the Hon'ble Supreme Court in the Judgment, DRT is bound to decide on this case immediately and in our view except Supreme Court no other court can stay the operation of the said directions given by the Supreme Court to DRT to proceed with the case as expeditiously as possible.

*\*The author is President (Law) and heading the Law Department of Axis Bank Ltd. Views expressed herein are those of the author and does not represent the views of his employer organisation, in any manner whatsoever. This is only an interpretation of the Supreme Court Judgment by the author.*