

# **Recall of previous DRT judgment allowing bank's claim against appellant due to erroneous finding of equitable mortgage, though bank's monetary claim was dismissed: DRAT KOLKATA**

Smt. Anita Agarwal

**...Appellant**

Punjab National Bank

**...Respondent**

**Case No: Appeal Dy No. 365 of 2022**

**Date of Judgement: 08.06.2023**

**Judges:**

Anil Kumar Srivastava, J – Chairperson

**For Appellant: Mr. Nemani Srinivas, Advocate.**

**For Respondent: Mr. S. Pal Chowdhury, Ms. Swasati Sikdar, Advocates.**

Facts:

Appellant Smt. Anita Agarwal purchased a property from a borrower of respondent Punjab National Bank. The bank filed an original application (O.A.) before the Debts Recovery Tribunal (DRT), Cuttack against the borrower, guarantor and the appellant for recovery of Rs. 22 lakhs. The DRT dismissed the bank's monetary claim of Rs. 22 lakhs against the appellant. However, it observed that there was an equitable mortgage of the appellant's property in favor of the bank.

Aggrieved by this observation, the appellant filed an application to set aside the DRT's order dated 27.12.2004. She also filed an application for condonation of delay in filing the application, stating she was not aware of the observation earlier. The DRT dismissed both applications by order dated 31.12.2007. The appellant then filed Writ Petition (W.P.(C)) No. 1101 of 2008 before the Orissa High Court. The High Court by order dated 28.06.2022 allowed the appellant to file an appeal before the DRAT within 01.08.2022. Accordingly, the appellant filed the present appeal on 29.07.2022.

#### Court's Opinion:

Although merits could not be dealt with, it appears the DRT inadvertently recorded the finding of equitable mortgage while dismissing the bank's monetary claim. When the monetary claim itself was dismissed, there was no need for the appellant to file an appeal earlier. She became aware of the erroneous observation only when the Recovery Officer initiated proceedings based on that. Therefore, there were sufficient reasons to condone the delay and recall the earlier DRT order. The DRT erred in dismissing the applications for condonation of delay and recall. The impugned DRT order dated 31.12.2007 is liable to be set aside.

#### Arguments:

##### Appellant:

She purchased the property from the bank's borrower in good faith. The bank's monetary claim against her was rightly dismissed by the DRT. But the DRT erroneously observed that her property was under equitable mortgage with the bank. She was unaware of this earlier and so there was a delay in filing the application. She came to know only when the Recovery Officer initiated proceedings based on that observation. Therefore, there were sufficient reasons to condone the delay and recall the erroneous observation.

##### Respondent Bank:

The appellant was fully aware of the DRT proceedings but did not appear regularly. She cannot take advantage of being a lady and seek condonation of long delay. The DRT rightly dismissed her applications for condonation of delay and recall.

### Referred Sections:

Section 5 of Limitation Act – For condonation of delay

Section 18 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – DRT's power to set aside its order.

### Laws Referred:

Limitation Act, 1963

Recovery of Debts Due to Banks and Financial Institutions Act, 1993

### Conclusion:

The appeal was allowed, delay condoned, and the DRT directed to consider afresh the appellant's application for recall of its previous order and decide within 3 months, in view of the inadvertent erroneous observation regarding equitable mortgage while dismissing the monetary claim itself.

### **Case Laws Referred:**

*No case laws were referred in the order.*

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### **Full Text of Judgment:**

1. Heard learned counsel for the parties and perused records. Impugned order dated 31.12.2007 was passed by learned DRT whereby the application of the appellant for setting aside the order dated 27.12.2004 after condoning the delay in filing application was dismissed. Feeling aggrieved the appeal is preferred along with application u/s 5 of the Limitation Act as would appear from the judgement of Hon'ble High Court of Orissa at Cuttack in WP(C) No. 1101 of 2008 dated 28.06.2022 appellant was given liberty to file an appeal before 1st August, 2022. Appellant preferred the appeal on 29.07.2022. Accordingly, there is no delay in preferring the appeal. I.A. No. 247 of 2022 is allowed. Delay in filing the appeal is condoned. Appeal Dy. No. 365 of 2022 This appeal arises against the impugned order dated 31.12.2007 passed by the learned DRT, Cuttack whereby the application

for condonation of delay was dismissed, consequently, the prayer for setting aside the order dated 27.12.2004 passed in TC 271 of 2001 was not taken into consideration. Learned counsel for the appellant submits that appellant is a lady who has purchased the property from the borrower of the respondent. Respondent bank filed an O.A. for recovery against the borrower and guarantor along with present appellant for recovery of Rs.22.00 thousand. In the O.A. proceeding, as far as claim against other defendants are concerned was allowed, but as far as appellant is concerned it was dismissed for recovery of Rs.22.00 thousand, but with an observation that there is an equitable mortgage of the appellant's property in favour of the bank, which was a wrong finding. The appellant is aggrieved with this finding and filed an application for setting aside the judgement and order dated 27.12.2004. It is further submitted that appellant once appeared before learned DRT, but thereafter she could not appear. She came to know the finding of the impugned judgement when Recovery Officer initiated recovery proceeding by issuing notice, which is per se illegal. Hence, on coming to know the finding in the body of the judgement appellant filed the application for recalling the judgement and its finding that the property in question is equitable mortgage with the bank along with the application for condonation of delay which was dismissed by learned DRT. Learned counsel for the respondent bank vehemently opposes the prayer and submits that appellant was fully aware of the proceeding, but did not appear. Appellant cannot take advantage of the fact that she is a lady. Accordingly, learned DRT has rightly dismissed the application for condonation delay. Heard learned counsel for the parties and perused records. As far as merits are concerned, in this proceeding, although issues could not be dealt with, however, it is observed that claim of the bank against the appellant for recovery of Rs.22.00 thousand was dismissed. It appears that inadvertently learned DRT has recorded a finding that property in question is in equitable mortgage with the bank. Appellant is aggrieved with this finding. Obviously when the claim of the bank against the appellant was dismissed there is no question of filing any appeal, but she came to know about the finding in the body of the judgement when the Recovery Officer initiated proceeding. On the basis of the finding recorded in the observation portion of the

judgement, appellant moved an application for recalling the order along with an application for condonation of delay. It is a good ground to condone the delay as well as recalling of the order which was refused by learned DRT. Accordingly, I am of the view that impugned order could not be sustained and liable to be set aside. Appeal is liable to be allowed.

Appeal is allowed. Impugned order dated 31.12.2007 is set aside. Accordingly, learned DRT, Cuttack is directed to decide the application for recalling the order dated 27.12.2004 in the light of the observation made in the body of this judgement. It is expected that learned DRT shall decide the matter within a period of three months from the date of receipt of the copy of the judgement as it is a very old matter. No order as to costs. File be consigned to record room.

Copy of the order be supplied to the appellants and the respondents and a copy be also forwarded to the concerned DRT.

Copy of the judgement/Final Order be uploaded in the Tribunal's website.

Order dictated, signed and pronounced by me in the open Court on this the 8th day of June, 2023.