M/S Kailash Art International& vs Central Bank Of India & Ors on 11 December, 2013

Author: Ramesh Kumar Datta

Bench: Ramesh Kumar Datta

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16665 of 2009

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1. M/S Kailash Art International, Factory and Regd. Office at Jamsut Ushri, P.S.Danapur, Distt- Patna, a Proprietorship Concern Of Sri Saryug Prasad S
2. Sri Saryug Prasad Singh S/O Late Kishun Singh R/O Gandhi Nagar(Gabhtal) Danapur, P.O. Digha, P.S.Digha, Distt- Patna
3. Smt. Sabitri Devi W/O Sri Saryug Prasad Singh R/O Gandhi Nagar(Gabhtal) Danapur, P.O. Digha, P.S.Digha, Distt- Patna

.... Petit

Versus

1. Central Bank of India, a Body Corporate Constituted Under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 having its Central Office at Chandramukhi Nariman Point Mumbai-400021, Carrying On Its Business amongst its Other Branches, a Branch at Danapur, P.O. -Danapur, P.S. Danapur,Distt- Patna represented by the Chairman cum Chief Managing Director
2. The Branch Manager, Central Bank of India Branch Danapur, P.O.&P.S.Danapur, Distt- Patna
3. Presiding Officer, Debts Recovery Tribunal Patna
4. Recovery Officer, Debts Recovery Tribunal Patna

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. R.K.P.Singh
Mr. Manish Kishore
For the Resp. Bank : Mr. Aditya Sharan
Mr. Prabhat Kumar Sharan
Mr. Hemant Kumar Sharan

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

JUDGMENT

Date: 11.12-2013

R.K.Datta,J. Heard learned counsel for the petitioners and learned counsel for the respondent-Central Bank of India.

The petitioners have filed the present writ

application for quashing of the order dated 31.8.2009 passed by the Presiding Officer, Debt Recovery Tribunal, Patna in M.A. No. 07/2009 as well as the Recovery Proceeding pending before the
Patna High Court CWJC No.16665 of 2009 dt.11.12.2013

Debt Recovery Tribunal, Patna before the Recovery Officer in R.P. Case No. 16/2007 and notice dated 27.3.2008 issued by the Recovery Officer under Section 29 of the Recovery of Debts Due to Bank and Financial Institution Act, 1993 (RDDBFI Act, in short) as also the order dated 19.4.2007 passed in OA (Ex.) Case No. 15/2006 by the Presiding Officer of the Tribunal.

The facts of the case, relevant to the adjudication of the present matter, are that on 7.6.1983 the respondent-Central Bank of India, Danapur Branch sanctioned Cash Credit Loan Limit of Rs. 70,000/- in favour of petitioner No.1, a proprietorship concern owned by the petitioner no. 2, Saryug Prasad Singh. The loan was granted on the guarantee of Lal Kishun Singh, father of petitioner no. 2, who is stated to have died on 2.2.2003 and Smt. Sabitri Devi, petitioner No.3. On default being committed by the loanee, the Central Bank of India filed Title Mortgage Suit No. 572/1987 in the Court of Subordinate Judge-I, Danapur claiming Rs. 1,49,628.89. The suit, upon transfer, was decreed ex-parte by Subordinate Judge-III, Danapur by his judgment and decree dated 21.4.1995

. It is the stand of the petitioner that the decree dated 21.4.1995, being a preliminary mortgage decree, no steps were taken by the Bank for getting the final decree and straightaway on 12.6.1996,

the respondent-Bank filed Execution Case No. 05/1996 Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 in the Court of the Subordinate Judge-III, Danapur on the basis of the said ex-parte preliminary mortgage decree claiming an amount of Rs. 5,40,634/- after including interest and adding the same in the principal. It is alleged that the petitioner no. 2 learnt about the said execution case for the first time on 24.8.1996 and also on inspection made about the ex-parte decree passed in Title Mortgage Suit No. 572/1987, the petitioners filed Miscellaneous Case No. 9/1996 on 14.10.1996 under Order IX Rule-13 of the Code of Civil Procedure to set aside the ex-parte decree. On 27.11.1996 Misc. Case No. 9/1996 was filed under Sections 47 and 151 of the Code of Civil Procedure challenging the maintainability of the execution case and the preliminary mortgage decree as not executable, apart from other grounds. A petition for stay of the execution case was also filed on 29.11.1996. The Bank filed objection in which the stand taken was that the execution case was filed after preparation of decree which is a composite decree for realization of the dues and also for mortgaged properties and the preliminary decree is already on the record and there is no final decree yet to be filed nor the opposite party had to await for anything and thus the execution case has been filed with legal provisions of the Code of Civil Procedure which is maintainable and operative, apart from other grounds raised therein. The Execution Case No. 05/1996 was however, ultimately dismissed Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 for default on 17.4.2004.

In the meantime, the judgment debtor no.4, namely, Lal Kishun Singh, one of the guarantors, died on 2.2.2003 and no steps for substitution were taken by the Bank in the execution case. Thereafter on 6.3.2006 the Bank filed an application under Section 31A of the RDDBFI Act before the Debts Recovery Tribunal, Patna for grant of a certificate amounting to Rs. 18,99,760.69 being the total of (i) decreed amount of Rs. 1,49,628.89 plus (ii) interest @ 14% per annum with quarterly rests from 1.2.1998 to 31.12.2005 amounting to Rs. 17.27,177.80 plus

(iii) amount of cost awarded with subsequently incurred Rs. 22,954.00 claiming further interest @ 14% per annum with quarterly rests from 1.1.2006 till its realization against the respondents/defendants-judgment debtors from their person and properties described in schedule I of the application and by attaching and selling their properties and also by imprisonment of the judgment-debtors. It was specifically stated in the said application that no other execution case had been filed earlier. The application was registered as OA (Ex.) Case No. 15/2006. The petitioners appeared before the DRT on 19.4.2007 with a prayer for adjournment for filing written statement which, it is claimed, was allowed but illegally by an ante-dated ex-parte impugned order dated Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 19.4.2007, the application of the Bank was allowed and certificate was issued.

Aggrieved by the same the petitioners filed CWJC 14720/2008 challenging the impugned order dated 19.4.2007 and also the jurisdiction of the DRT in entertaining the application under Section 31A of the RDDBFI Act and the maintainability of the original application. Three grounds were taken by the petitioners in challenging the proceedings, namely, (i) that a preliminary decree in a mortgage suit is per se not executable and if executable, it is executable only in the shape of obtaining a final decree of foreclosure and sale of the mortgage assets for recovery of the amount under the mortgage and such decree in a mortgage suit cannot be treated as a simple money decree

and execution thereof sought through the DRT as it is not a decree for legally recoverable dues; (ii) that the proceedings before the DRT are barred by limitation by virtue of Section 24 of the DRT Act, as an application under Section 31A of the Act would be governed by Article 137 of the Limitation Act and not Article 136 which is the limitation for execution of a decree; and (iii) that the decree was only for about Rs. 1,49,000/- but the jurisdiction of the DRT starts with Rs. 10/- lacs and thus merely by leaving the decree unexecuted and then adding the interest thereon the jurisdiction cannot be conferred upon the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 DRT.

This Court by order dated 9.2.2009 disposed of the writ application, rejecting the 3rd ground raised aforesaid holding that the said question is settled by the decision of the Apex Court in the case of Punjab National Bank, Dasuya Vs. Chajju Ram and others: 2000(6) SCC 655, which had been followed by this Court in the case of Durga Prasad Sah Vs. State of Bihar and ors. : 2003(2) PLJR 409, holding that it is not in dispute that on the date when the application was made to DRT, the decretal amount along with accrued interest exceeded rupees ten lakhs and thus DRT had jurisdiction aforesaid to entertain the case. So far as the other two objections were concerned, it was stated that they are question of jurisdiction which for the petitioners can be available to raise before the DRT at the first instance, directing the DRT to decide all objections raised by the petitioners within a period of two months from the date such objection is filed before the Presiding Officer, DRT subject to the petitioners cooperating in the matter and observing that the DRT would be well advised to hear the parties and then decide the issue about its own jurisdiction and deal with all the objections as raised by the petitioners. The petitioners thereafter filed their application which was registered as MA No. 7/2009 and by the impugned order dated 31.8.2009, the application has been Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 dismissed with cost.

Learned counsel for the petitioners has raised various pleas including the jurisdictional issues before this Court. He has again sought to argue that the jurisdiction of the DRT is only with respect to a claim for Rs. 10/- lacs and more and since the preliminary decree had been granted for Rs. 1,49,628.89, hence, no application could have been filed before the DRT on the basis of such decree.

In my view the said issue having been raised earlier by the petitioners in CWJC No. 14720/2008 and this Court having already decided the said issue against the petitioners giving liberty to the petitioners to raise other two questions which were questions of jurisdiction before the DRT along with all other objections, it is not open to the petitioners to raise the said issue again in this writ application as the same would be barred by the principles of res judicata.

Learned counsel for the petitioners has sought to rely upon certain provisions of the RDDBFI Act. He refers to the definition of debt as given in Section 2(g) as also Section 31A of the Act and further upon Sections 1,17 and 18 of the Act which are in the following terms.

Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 "Section 2(g)- "debt" means any liability inclusive of interest which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in case 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 application."

"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) On receipt of an application under sub-section (1), the Tribunal may issue a certificate for recovery to a Recovery Officer.

(3) On receipt of a certificate under sub-section (2), the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 debt recoverable under this Act."

"Section 1. Short title, extent, commencement and application.- (1) This Act may be called THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993.

(2) It extends to the whole of India except the State of Jammu and Kashmir (3) It shall be deemed to have come into force on the 25th day of June, 1993 (4) The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to a consortium of banks or financial institutions is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may, by notification, specify."

"17. Jurisdiction, 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.

(2) An appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 order made, or deemed to have been made, by a Tribunal under this Act."

"18. Bar of jurisdiction.- 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.

Provided that any proceedings in relation to the recovery of debts due to any multi-State co- operative bank pending before the date of commencement of the

> Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings."

It is submitted by learned counsel that the key words in Section 2(g) of the Act are that the liability inclusive of interest which is claimed as due from any person by a bank must be subsisting on and legally recoverable on the date of application. It is urged by learned counsel that the same means that the debt should not be deemed barred on the date of the application and must be legally recoverable, i.e., may be enforced in a Court of law for Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 recovery and there should not be any impediment in such recovery due to its enforceability.

It is submitted by learned counsel in elaboration of the aforesaid question that a preliminary decree must become final before it can be executed, as a final decree alone can be executed. Since there is no provision of limitation for filing an application for final decree, the same would be covered by the residuary Article 137 of the Limitation Act, 1963 which provides for any other application for which no period of limitation was provided and in that case the period of limitation would be three years from the date when the right to apply accrued. It is thus submitted by learned counsel that the preliminary decree having been passed on 21.4.1995, the application for final decree could have been made within three years from the said date, i.e., by 21.4.1998 and that having not been done, there is no enforceable decree in existence for which any application under Section 31A of the RDDBFI Act could have been filed.

It is contended that what cannot be done directly cannot be permitted to be done indirectly by taking recourse to the provisions of Section 31A of the Act. As a preliminary mortgage decree it was not enforceable and executable and shall not come within the ambit of „debt and therefore cannot be enforced under Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Section 31A for the purpose of recovery of the amount involved in the decree. In support of the aforesaid propositions, learned counsel for the petitioners relies upon a decision of the Supreme Court in the case of Venkat Reddy Vs. Pethi Reddy: AIR 1963 SC 992, in the relevant part of para-6 it is stated as follows:

> "6.....It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Ss. 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be " modified and amended". Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which

would operate as res judicata between the parties if it is Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

He also relies upon a decision of the Supreme Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Court in the case of Shankar Balwant Lokhande Vs. Chandrakant Shankar Lokhande : AIR 1995 SC 1211, in para-12 of which it has been held as follows:

" 12. As to Maksudans case (AIR 1983 Patna

105) (supra), we state that it had not been correctly decided. Limitation does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing final decree does not amount to passing a final decree. Until the final decree determining the rights of the parties by metes and bounds is drawn up and engrossed on stamped paper (s) supplied by the parties, there is no executable decree. In this behalf, it is necessary to note that S. 2(a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of civil Court is required to be stamped as per Article 46 in Schedule-I. Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped".

Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18(2). After final Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s), it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute final

decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged on Order 20 Rule 18(2), attracting residuary Article 182 of the old Limitation Act. Contrary views of the High Courts are not good law. A division Bench of the Andhra Pradesh High Court in Smt. Kotipalli Mahalakshmamma v. K. Ganeswara Rao, AIR 1960 Andh Pra 54, correctly decided the question of law which held that the limitation begins to run only after a final decree is engrossed on stamped papers."

Learned counsel also cites in support of his stand the decision of the Apex Court in the case of Maharashtra State Financial Corpn. Vs. Ashok Kumar Agarwal: (2006) 9 SCC 617, paras 5 and 6 of which are quoted below:

> "5. Sections 31 of the Act contains special provisions for enforcement of claims by State Financial Corporations. It is by way of a legal Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 fiction that the procedure akin to execution of decrees under the Code of Civil Procedure has been permitted to be invoked. But one cannot lose sight of the fact that there is no decree or order of a civil court when we are dealing with applications under Section 31 of the Act. The legal fiction at best refers to a procedure to be followed. It does not mean that a decree or order of a civil court is being executed, which is a sine qua non for invoking Article 136. The proposition set out in the case of Gujarat State Financial Corporation (supra) found support in M/s. Everest Industrial Corporation and Others v. Gujarat State Financial Corporation 1987(3) SCC 597. Again in Maganlal etc. vs. Jaiswal Industries Neemach & Ors. 1989 (3) SCR 696 this court noticed that an order under Section 32 is not a decree stricto sensu as defined in Section 2(2) of the Code of Civil Procedure, the financial Corporation could not be said to be a decree holder. This makes it clear that while dealing with an application under Sections 31 and 32 of the Act there is no decree or order of a civil court being executed. It was only on the basis of a legal fiction that the proceedings under Section 31 are treated as akin to execution proceedings. In fact this Court has observed that there is no decree to be executed nor there is any decree holder or judgment debtor and therefore in a strict sense it cannot be said to Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 be a case of execution of a decree. Article 136 of the Limitation Act has no application in the facts of the present case. Article 136 specifically uses the words "decree or order of any civil court".

The application under Sections 31 and 32 of the State Financial Corporation Act is not by way of execution of a decree or order of any civil court.

6. Article 137 of the Limitation Act applies in the facts of the present case. When Article 137 is applied, the application moved by the appellant- Corporation on 2nd January, 1992 for proceeding against the sureties i.e. the respondents herein, was clearly barred by time and the courts below were correct in holding so. To recall the facts of the present case, the notice demanding repayment of the amount of loan was issued against the borrower, that is, M/s. Crystal Marketing Private Limited on 8th March, 1983 and the application under Sections 31 and 32 of the State Financial

Corporation was filed against the said borrower on 25th October, 1983. The liability of sureties had crystalised then."

Learned counsel also relies upon a few other decisions to the same effect, namely, W.B.Essential Commodities Supply Corporation LTD. Vs. Swadesh Agro Farming And Storage Private LTD.: AIR 1999 SC 3421= (1999) 8 SCC 315, Hameed Joharan (dead) & Ors. Vs. Abdul Salam (Dead) by LRs.: AIR 2001 Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 SC 3404= (2001) 7 SCC 573 and Neelu Gupta Vs. State Bank of India & Ors. : AIR 2008 Patna 73.

It is also contended by learned counsel that there being no period prescribed for filing an application under Section 31A under the Limitation Act, which applies to a proceeding under the RDDBFI Act by virtue of Section 24 of the latter Act, such an application must be filed within three years of the decree or Order under the residuary Article 137 of the Limitation Act.

It is also submitted by learned counsel that in such matters the provisions of Sections 1,17 and 18 of the Act must be examined along with Section 31A to see as to when the cause of action arose. It is alleged that on 17.1.2000, when the amended provisions of Section 31A was enforced, any application under the said provision ought to have been filed within three years of the enforcement of Section 31A of the Act, i.e., latest by 17.1.2003 which has not been done in the present case.

It is also urged by learned counsel that the order dated 17.4.2004 passed by the Civil Court dismissing the execution case No. 05/1996 would operate as res judicata to the application filed by the Bank under Section 31A of the Act. In support of the said proposition learned counsel relies upon a decision of the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Supreme Court in the case of Ganpat Singh (dead) by L.Rs. Vs. Kailash Shankar and others: AIR 1987 SC 1443, in para-14 of which it has been held as follows:-

> "14. We may now consider the above contention of the learned Counsel for the respondent decree- holder. It has been already noticed that on January 2, 1979 while dismissing the application of the judgment-debtor under O. XXI R. 90 of the Code, the learned District Judge also confirmed the sale. The said order of the learned District Judge confirming the sale is binding not only on the judgment-debtor, who made the application under O. 21 R. 90, but also on all other parties to the execution proceedings including the 4th judgment-debtor. Accordingly, there can be no doubt that the application filed by the 4th judgment-debtor praying for the setting aside of the sale on grounds other than those mentioned in R. 89, 90 and 91, was not maintainable after the confirmation of the sale. Indeed, by the order dated July 21, 1979 the learned District Judge while dismissing the application of the 4th judgment-debtor observed that after the confirmation of the sale, the court was not authorised to entertain the application. We do not think that the decision of the Privy Council in Chandra Manis case (supra) lends any support to the contention of the learned Counsel for the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 respondent decree-holder that an auction-sale can be set aside even on grounds other than those mentioned in R. 89, 90 and 91. All that has been ruled in that decision is

> that in construing the meaning of the words "when the sale becomes absolute" in Art. 180 of the old Limitation Act, regard must be had not only to the provision of O. XXI R. 92(1) of the Code, but also to the other material sections and orders of the Code including those which relate to appeals from orders, made under O. XXI R. 92(1). No provision of the Code has been pointed out to us under which a sale can be set apart from the provisions of R. 89, 90 and of O. XXI of the Code, There can be no doubt that when an application for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principle of res judicata. In the circumstances, there is no merit in the contention made on behalf of the respondent decree-holder that the application for delivery of Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 possession having been made within one year of the dismissal of the application of the 4th judgment-debtor for setting aside the sale, it was within the period of limitation as prescribed by Art. 134, Limitation Act."

Learned counsel also relies upon a decision of the Apex Court in the case of Ameena Amma (Dead) through LRs. & ors. Vs Sundaram Pillai & Ors.: (1994) 1 SCC 743, in para-15 of which it has been laid down as follows:

> "15. It will be noticed that Execution Petition No. 588 of 1958 was filed against defendant 3 in the first suit and on the face of it since defendant 3 was not party to the original decree, the application under Order 21 Rule 35 of the Code of Civil Procedure was dismissed on September 24, 1958 solely on the ground that the execution petition was not maintainable against defendant 3 as there was no decree against him. There was no adjudication on merits or investigation into the claim of defendant 3 in that execution petition. Once this position becomes clear it is obvious that the order dated September 24, 1958 merely held that the execution petition in the earlier suit could not be filed against defendant 3 directly. There was no need to challenge that order in appeal or otherwise as that was the correct order. It was only when the second Execution Petition No. 819 Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 of 1960 was filed against the original judgment- debtor (defendant 2) and the defendant 3 in suit i.e. sub-lessee obstructed the Amin, that the present suit was filed under the provisions of Order 21 Rule 103 of the Code of Civil Procedure and there was no legal bar to it either of res judicata or otherwise. It is settled law that the general principles of Section 11 of the Code of Civil Procedure apply to execution proceedings as well but the basic criteria for applying the principles of res judicata is that the order must be between the same parties and that the matter should have been heard and decided by such court. Execution Petition No. 819 of 1960 was not between the same parties as Execution Petition No. 588 of 1958. Execution Petition No. 588 of 1958 was filed against Subramania Pillai who was not a

party to the decree for delivery of possession and it was not heard and decided on merits. It was simply dismissed on the ground that the execution did not lie against the third defendant. Hence the order in Execution Petition No. 588 of 1958 did not operate res judicata for the purpose of decision of Execution Petition No. 819 of 1960 or the present suit."

Learned counsel also relies upon a decision of this Court in the case of Ramashray Prasad Choudhary Vs. Krishna Nandan Singh : 1999 (2) PLJR 776.

Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 It is also submitted by learned counsel for the petitioners that Section 31A of the Act has no application to a case where an execution case had already been filed and was pending at the time when the Section was introduced on 17.1.2000 and will only apply to those cases in which no execution case was filed earlier.

It is further submitted by learned counsel that in the present matter the certificate dated 19.4.2007 of the DRT being against a dead person, father of petitioner no.2, who was defendant no. 3 in the suit having died on 2.2.2003, would become a decree against a dead person and would therefore be null and void. In support of the same, learned counsel relies upon a decision of a Full Bench of this Court in the case of Jungli Lall and others Vs. Laddu Ram Marwari and another: AIR 1919 Patna 430 in which it has been held that the procedure prescribed for mortgage suits under Order 34 differs from that prescribed by the Transfer of Property Act in that it requires a final decree to be passed before execution can take place and before that is done, there is no decree or judgment that can be executed; although in a mortgage suit the plaintiff s right to execute the final decree depends in part upon the determination of issues upon which the preliminary decree is based Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 no final decree can be obtained without a further hearing and determination of subsequent issues and therefore in such a suit, the hearing contemplated in Order 22, Rule 6 must be taken to be the final hearing which must necessarily take place before a decree capable of execution can be passed and therefore where a defendant in a Mortgage Suit dies after the passing of the preliminary decree and the final decree is obtained without bringing his legal representatives on the record, the decree so obtained is a nullity and is not capable of execution.

Learned counsel also relies upon a decision of a learned single Judge of this Court in the case of Ramsewak Mishra Vs. Mt.Deorati Kuer: AIR 1962 Patna 178, in para-7 of which relying upon an earlier Division Bench decision of this Court in the case of Babuie Shanti Devi Vs. Khodai Prasad Singh & Ors: AIR 1942 Patna 340 and of the Assam High Court in Ajoy Kumar Mukhopadhyaya V/s. Puspabala Chaudhury AIR 1953 Assam 54, it was held as follows:

"7. The effect of the non-substitution of the widow before the final decree is to render the decree null and void, because a decree either for or against a dead person is absolutely ineffectual and invalid. The above view gains support from a decision of the Assam High Court in Ajoy Kumar Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Mukhopadhyaya V/s. Puspabala Chaudhury AIR 1953 Assam 54. "That was a suit for accounts, and a final decree was passed in that case after the death of the defendant who was alive when the preliminary decree was passed but without making his heirs

and legal representatives parties to the proceeding of the final decree. There it was held that the final decree was void and a nullity. The view taken in AIR 1942 Pat 340, referred to above, also seems to support this proposition of law. While considering the question of law whether in the case of a death of a party after the preliminary decree in a mortgage suit the substitution of his heirs and legal representatives would be governed by Rules 3 and 4 of Order XXII or Rule 10 of that Order, their Lordships observed that the rule is that on the one hand, no final decree can be passed without the representative of the deceased party being brought on the record; but on the other hand, that Rule 10, and not Rules 3 and 4 of Order XXII of the Code of Civil Procedure are to be regarded as governing the procedure for making the necessary substitution. It is, therefore, manifest that the final decree passed in the instant case in the absence of the widow of Ramautar Singh is null and void and has to be set aside. I, accordingly, agree with the view taken by U. N. Sinha, J. that the appeal should be allowed."

Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Two other issues have been raised by learned counsel for the petitioners. It is submitted that there was a deliberate concealment of material fact by the respondent-Central Bank of India in its application under Section 31A before the DRT that no other execution case had been filed. It is submitted that fraud and misrepresentation at the first instance vitiates the judgment and therefore, for the said reason alone the certificate issued by the DRT ought to be quashed. In support of the same, learned counsel relies upon several decisions of the Supreme Court, namely, United Insurance Company Limited Vs Rajendra Singh & Ors. : (2000) 3 SCC 581, the case of Deepa Gourang Murdeshwar Katre Vs. The Principal, V.A.V.College of Arts & Ors. : 2007 (2) PLJR (SC) 66 as also the case of S.P.Chengalvaraya Naidu (Dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others: AIR 1994 SC 853.

It is also submitted by learned counsel for the petitioners that there has been violation of the principles of natural justice by the DRT as the certificate has been issued on the same day of appearance of the petitioners on 19.4.2007 without giving time to them for filing reply and the same is contrary to the provisions of Section 21 of the RDDBFI Act which mandates that the DRT shall follow the principles of natural justice. Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Learned counsel for the respondent-Bank, on the other hand, submits that the order of the DRT impugned in the present case is appealable under the provisions of RDDBFI Act and thus in the presence of alternative statutory remedy, the writ application should be dismissed as not maintainable. In support of the same he relies upon para-6 of a decision of the Supreme Court in the case of Punjab National Bank Vs. O.C. Krishnan & Ors: AIR 2001 SC 3208 which is in the following terms:-

> "6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the

> court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

Learned counsel further submits that dismissal of an execution case in default does not operate as res judicata and therefore, the second application for execution before the DRT was maintainable. In support of the same learned counsel relies upon a decision of the Supreme Court in the case of Shivashankar Prasad Sah and another. Vs Baikunth Nath Singh and others, : AIR 1969 SC 971, in para-6 of which it has been held as follows:

> "6. The Courts in India have generally taken the view that an execution petition which has been dismissed for the default of the decree-holder though by the time that petition came to be dismissed, the judgment-debtor had resisted the execution on one or more grounds, does not bar the further execution of the decree in pursuance of fresh execution petitions filed in accordance with law - see Lakshmibai Anant Kondkar v. Ravji Bhikaji Kondkar, 31 Bom LR 400. Even the dismissal for default of objections raised under Section 47, Civil Procedure Code does not operate as res judicata when the same objections are raised again in the course of the execution-see Bahir Das Pal v. Girish Chandra Pal, AIR 1923 Cal 287; Bhagwati Prasad Sah v. Radha Kishun Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Sah, AIR 1950 Pat 354; Jethmal v. Mst. Sakina, AIR 1961 Raj 59; Bishwanath Kundu v. Smt. Subala Dassi, AIR 1962 Cal 272. We do not think that the decision in Ramnarain v. Basudeo, ILR 25 Pat 595 on which the learned Counsel for the appellant placed great deal of reliance is correctly decided. Hence we agree with the High Court that the plea of res judicata advanced by the appellant is unsustainable."

Learned counsel also relies upon a decision of a learned single Judge of Punjab and Haryana High Court in the case of Yash Pal Sharma Vs. Ajit Singh & Ors: 2006(2) ISJ (Banking) 276 which is to the same effect.

It is next submitted by learned counsel for the respondent-Bank that the decree in the present matter is a composite decree, money decree as well as mortgage decree, and thus it was executable as such without the necessity of any final decree under Order 34 Rule 5. In support of the same learned counsel relies upon the observations made in the decision of a learned single Judge of the Delhi High Court in the case of Laxmi Commercial Bank Ltd., New Delhi Vs. M/s. American Rubber Mills Co., Delhi and others :

> AIR 1972 Delhi 118; paras 11,15 and 17 of the said decision is quoted below:
>
> Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 "11. A Bench of the Patna High Court in Lalji Bhagat V. Babu Raghubans Prasad: AIR 1964 Pat 135 observed as under:-

"The true test for determining whether an absolute decree is necessary in such cases or not is to find out if the compromise decree is by itself capable of execution without further proceeding in the suit so that the decree-holder may realize his dues by sale of the mortgaged properties or otherwise. It is obvious from the terms of the compromise in the instant case that the compromise decree was not by itself capable of execution. One of the terms incorporated in the preliminary decree was that, in default of payment of any of the instalments, the plaintiff would be competent to start proceedings for final decree and to recover the dues by sale of the mortgaged property as well as from the person and other properties of the defendants. It is clear therefore, that the decree dated the 27th June, 1945 could not have been executed without further proceedings in the suit itself. In view of the term just mentioned, and had the plaintiff made any attempt to sell the mortgaged property by executing the decree dated the 27th June, 1945, he would have been confronted with this term ..... In view of the foregoing discussions, the correct legal position is this. If a mortgage suit is Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 decreed in terms of a compromise, the consent decree amounts to a final decree only when nothing further is to be done in the suit in order to enable the decree-holder to execute the decree. But in case the consent decree cannot be executed without further proceedings in the suit, the decree-holder has to take steps in the suit to have the decree made absolute in terms of the compromise, and whether any rule or Order 34, Code of Civil Procedure, applies or not, the order making the decree absolute amounts to a final decree....."

"15. Order 34, Rule 5, Civil P.C. contemplates the passing of a final decree in certain contingencies but it is attracted only where a preliminary decree has been passed under Rule 4. Therefore where only a money decree has been passed initially a final decree under R.5 is not necessary although the decree may authorize the decree-holder to realize the decretal amount by sale of the judgment-debtor s property. Where, however, the property is charged with the payment of the decretal amount the proper mode of realizing the decretal amount is to obtain a decree absolute for sale. We have thus to construe the decree in the present case to find out whether it is a decree to which Rule 5 would be attracted."

"17. The compromise which resulted in the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 decree being passed sets out that a decree for recovery of money by instalments be passed. There is no bar to a decree under Order 34, Rule 4, Civil P.C.being passed in terms of a compromise extending the period allowed for payment in accordance with the wishes of the parties which is not limited to the period of six months prescribed by O.34, R. 2(b). It was in terms of this prayer that the court passed a compromise decree under Order 34, Rule 4 Civil P.C.. A reading of the decree in the present case brings it clearly within the ambit of the rule laid down by the Bench of the Allahabad High Court in AIR 1929 All. 881. The decree was passed on an application moved by the plaintiff-decree- holders under the provisions of Order 23, Rule 3, Civil P.C. The provisions in the decree for getting the pledged stocks

released by payment of four instalments and the charge created on other immovable properties go to show that the decree was under Order 34, Rule 4, Civil P.C. and something more has to be done on report by the decree-holder that payment of money has not been made or part of the decretal amount had not been paid and so a decree for sale of the property mortgaged may be passed. On a construction of the decree, therefore, I hold that it is a preliminary decree passed under Order 34, Rule 4, Civil P.C. and by itself could not be executed Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 till a decree absolute was obtained by the decree- holder. The terms on which the decree has been passed clearly fall within the ambit of the rule laid down by the Patna High Court in the case of Lalji Bhagat, AIR 1964 Pat 135 and the rule laid down by the Bench of the Allahabad High Court in the case of Mohammad Unis, AIR 1929 All

881. The decree-holder having consented to a decree being passed under Order 34, Rule 4, Civil P.C. cannot take advantage of the rule enunciated by the Full Bench of the Allahabad High Court in Askari Hasan s case, AIR 1927 All 167 (FB). The auction sale, therefore, could not take place on the execution application as made by the decree-holder. I, therefore, decided Issue No.1 in favour of the objectors."

Learned counsel also relies upon a decision of a Division Bench of the Bombay High Court in Chhaganlal Sakarlal Vani Vs. Jayaram Deoraj Thakar & Ors. : AIR 1927 Bombay 131, at page 133 of which it has been held as follows: -

"As regards the first point, it is perfectly true to say that there was a preliminary decree passed, and there was the order making the decree for sale absolute; but there was no formal final decree drawn up. Technically, therefore it is right to say that there is no final decree which could be Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 executed. This contention has become possible because of the laxity which prevails in the lower Courts in drawing up decrees in mortgage suits. In the present case the preliminary decree was drawn up in the proper form provided by the Code of Civil Procedure. Under R. 5 of O.34, when such payment as is directed by the preliminary decree is not made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold. And when an order making the decree absolute is made, the final decree has to be drawn up. The question that now arises is whether, at this distance of time, nearly fifteen years after the decree, and twelve years after the order making the decree absolute was made, the execution can go on or not.

Having regard to the terms of the preliminary decree which has been made absolute, we could only attribute the omission to have a final decree drawn up to a misapprehension on the part of the Court, as well as the parties concerned, as to the necessity of having a final decree formally drawn up. The parties seem to have gone on all the years on the footing that the preliminary decree which was made absolute, was the formal expression of the final decree under R. 4 of O. 34, as from the date

when it was made absolute. I am of opinion that, though the final decree has not been formally Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 drawn up on the terms of the preliminary decree, which has been made absolute, that decree coupled with the order may be taken under the circumstances to be the final decree. In its ultimate analysis, it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of execution; and it is necessary to seek that even such a formal defect does not creep in, and that a formal decree is drawn up when the decree is made final. But, under the circumstances of this case, we are not prepared to hold that there is no executable decree. The result of allowing the contention of this nature at this distance of time will be that a decree will have to be drawn formally now and a fresh beginning will have to be made in the way of execution after the lapse of so many years. That is a result which should be avoided so far as it is legally possible to do so. On this point there is no express decision which can help the Court one way or the other. But, having regard to the observations in Jawahir Mal v. Kisturchand: (1891)13 All.343, it seems to us that an omission of this kind may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable as they are in this case. Section 99 of the Code of Civil Procedure would cover such an error or irregularity, as, under circumstances such as we Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 have in this case, it does not affect the merits of the case or the jurisdiction of the Court."

Learned counsel also relies upon a decision of the Apex Court in the case of State Bank of India, Vs. Messrs. Index Port Registered and others, :(1992) 3 SCC 159 in para 10 of which it has been held as follows:-

"10. It will be noticed that the loan was taken by the firm, namely respondent No. 1, which consisted of Sh. Dhaneshwar Kumar Jain, respondent No. 2 (defendant No. 2) and Sh. Ajay Kishan Mehta (since deceased). The respondent No. 2 (defendant No. 2) had created an equitable mortgage of his shop and respondent No. 4, who is a father of late Sh. Ajay Kishan Mehta stood guarantor for the loan to respondent No. 1. The very wordings of the decree quoted above shows that it is a personal decree against all the defendants/ judgment-debtors. Respondent No. 4 was defendant No. 4, so it is a money decree against defendant No. 4 as well. It is also a mortgage decree against the mortgagor, namely - defendant No. 2 only. The decree specifically mentions that a money decree is being passed for recovery of Rupees 33,705/ 22 with costs and the defendants shall pay interest @ 7% per annum from the date of the institution of the suit till its realisation. There is also a decree passed in favour Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 of the Bank entitling it to sell the shop in case decretal amount is not paid within three months from the date of the decree and the decree specifically mentions that it will be deemed to be a personal decree against all the defendants (respondents). Only qua defendant No. 3 it can be executed only to the extent the mother inherited the estate of her son Shri Ajay Kishan Mehta. It is thus clear from the decree that it is a money decree against all the defendants

> (respondents) and a mortgage decree only against defendant No. concerned. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 of shop after three months. The decree is not in the prescribed Form No. 5 of Appendix D to the Code of Civil Procedure."

He also relies upon a decision of the Apex Court in the case of Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala: (2009) 9 SCC 478, in para-17 of which reliance has been placed on the above said case. He also relies upon a decision of a learned single Judge of Madras High Court in the case of (Machullathil) Chandukutty Nayar Vs. Kuruvathancheri Keezana Narayana Nayar and ors.: AIR 1925 Madras 1083.

Learned counsel for the Bank further submits that the question of nullity does not arise in an execution case as Order 22 Rules 4 and 5 does not apply. It is submitted that the Bank was not aware of the death of the original defendant no.3, father of petitioner no. 2 which fact was concealed by the petitioners even in the execution case and also by not disclosing it before the DRT when they appeared before it. In support of the same learned counsel relies upon a Division Bench decision of this Court in the case of Ram Chandra Prasad Vs. Jagarnath Prasad & Ors: AIR 1983 BBCJ 154, in paras 4 and 5 of which it has been held as follows:-

> "4. I will first take up the effect of the death of defendant No. 8 on the decree. It is, no doubt, true Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 that executing Court has got a very limited jurisdiction to go behind the decree and one of the grounds being, whether the decree is a nullity, inter alia, having been passed against a dead person. In the case of a deceased being the sole defendant or respondent, his death undisputedly renders the whole suit or appeal incompetent on the ground of abatement, but where the deceased is one of the many defendants or respondents the effect of partial abatement on the whole suit or appeal would depend upon the nature of the suit or appeal. If on account of the partial abatement the whole suit or appeal becomes incompetent, then also in a given case the entire decree becomes a nullity, but if the suit or appeal can proceed to a final adjudication in the absence of the legal representatives of the deceased defendant or respondent, the death or, for the matter, abatement of suit or appeal to that extent would not affect the rest of the suit or appeal and a decree passed against the defendants or respondents would be good and operative against them. In short, the acid test would be to see as to whether the suit itself could be instituted and successfully prosecuted without the deceased defendant

or, as in the present case, without the minor defendants. In my view, on the facts stated above it is quite obvious that the plaintiff could have instituted the suit only against defendant 1 Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 and 2, the executants of the mortgage bond, without impleading any other member of their family. They impleaded other members simply as a matter of abundant caution so that no objection could be raised by them at any stage of the proceeding. Once such a view can be taken which, in my view must be taken on the facts of this case, then the entire execution case cannot be thrown away on the ground that the decree under execution was a nullity, having been passed against such a person. I may refer to an old Bench decision of our own Court in Nathuni Narayan Singh and Ors. V/s. Mahant Arjun Gir and Ors. A.I.R. 1925 Patna 134, where a joint decree was passed against several defendants, but one of them had died before the passing of the decree. On the facts of that case when it was found that the decree being binding on the surviving defendants it was not a nullity as against those defendants but failed only as regards the deceased defendant and his heirs. The executing Court in its order has overruled this objection on the ground that the judgment debtor failed to point out as to whether Mossomat Bilat Devi, who was the mother of the executants, had left any other heirs besides the defendants who were already on the record. The lower appellate Court had proceeded to examine as to whether the decree holders were bound to take steps for substitution Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 and in any view of the matter to satisfy the Court that she died leaving no other heirs than those already on the record.

5. In view of the change in the attitude of the Courts in the matter of abatement and the development of law in this regard, as well as for the reasons given above, it is not possible to uphold the view of the Court of appeal below that the death of defendant No. 8 rendered the entire decree a nullity."

Learned counsel also relies upon a decision of a Division Bench of the Calcutta High Court in the case of Abdus Sattar Vs. Mohini Mohan Das & Ors. : AIR 1933 Calcutta 684, at page 687 of which it has been held as follows:

"Therefore it has been held on these authorities that the court which has passed the decree had power to execute the decree notwithstanding the provisions of S. 37 and we are of opinion that the Court which passed the decree does not cease to exist merely because the pecuniary jurisdiction of the said Court had altered. It seems to us that the Court below was correct in taking the view that the application of 1925 was made to the proper Court and it was sufficient to save limitation. Another point that was argued is that even if that is so the application of 1928 was not an application in accordance with law because it was Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 filed against a dead person Mahammad Abru. The rule, that when a suit is filed against a dead person it is a nullity, does not apply to execution proceedings. The decree was rightly obtained against Mahammad Abru and the application for execution was presented against him at the time in ignorance of his death. The decree

> was a good decree against Abru and as soon as it was brought to the notice of the decree holder that Abru was dead he made an application for substitution of the heirs of the deceased in the execution proceedings. We do not see anything irregular in the application of 15th November, 1928. These two applications are in order and there is no question that the applications of the decree holder was in time. The result is that this appeal fails and must be dismissed. There will be no order as to costs."

It is also submitted by learned counsel that in the present matter it is defendant nos. 1 and 2 who had taken the loan and the deceased defendant no. 3 judgment debtor was the father of defendant no.2, petitioner no.2 herein and had stood guarantor for the loan apart from defendant no.4, the mother of petitioner no. 2 and one of the sons, namely, petitioner no. 2 was already on the record and the estate was represented and as such the proceeding should not be said to be against a dead person.

Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 I have considered the rival submissions of learned counsels for the parties. In the present matter it would be appropriate to first consider the plea of alternative statutory remedy raised by learned counsel for the respondent-Bank. It is evident from the order dated 9.2.1990 passed in CWJC No. 14720/2008 filed by the petitioners earlier that the issues raised by the petitioners pertain essentially to the jurisdiction of the Tribunal to have entertained an application under Section 31A of the RDDBFI Act as also passed the orders upon such application which have been challenged by the petitioners as without jurisdiction. That being the situation, it cannot be said that the present writ application is automatically barred by existence of alternative statutory remedy of appeal. Where the question of jurisdiction is raised, it is open to this Court to interfere in exercise of powers under Article 226 of the Constitution as held by the Apex Court in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.: (1998) 8 SCC 1. The plea of alternative statutory remedy as a bar to the present proceedings as raised by learned counsel for the respondent- Bank is, accordingly, rejected.

In the present matter it would be relevant to note that the reliefs sought in the plaint, inter alia, are to declare the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 property described in Schedule-II of the plaint as validly mortgaged in favour of the Bank and charged for due repayment of the bank loan and that the plaintiff is entitled to the first charge over the mortgaged properties; a mortgage decree under Order 34 Rule 4 for Rs. 1,49,628.89/- as detailed in schedule 1 of the plaint and against the defendant nos. 2 to 4 charging the amount decreed on the mortgaged properties detailed in schedule-II; a period of grace be allowed to the defendants for payment of the decreed amount and if they fail to make payment within the period allowed by the court, the decree be made final and the decreed amount with future interest and cost of execution ordered to be satisfied by the sale proceed of the mortgage properties and in case the decreed amount with cost and interest, etc. is not satisfied by the sale proceeds of the hypothecated and mortgaged properties, the plaintiff may be allowed to proceed against the person and other properties of the defendants for the balance amount and decree for such balance be passed against all the defendants jointly and severally. Schedule-I of the plaint gave the amount claimed as on 23.9.1987 at Rs. 1,49,628.89 and the Schedule-II gave the description of the property mortgaged. The decree dated 21.4.1995 provided as follows:-

> "It is ordered and decreed that the suit be decreed Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 ex-parte with cost. The defendant has directed to pay the entire decretal amount within 30 days for the date of passing of Order failing which the Plaintiff may realize the decretal amount by filing of the execution case against the defendant at his cost. During pendentilite and future interest at the agreed rate is also allowed. Reader fee and Pleader Clerk Rs. 100/- at the rate of usual ex- parte is also allowed and that the sum of Rs. 4954/- only as paid by the defendants to the plaintiff on account of the cost of this suit, with interest thereon at the rate of X per annum from this date filing to date of realization."

It is evident from a consideration of the aforesaid decree that on the one hand it decreed the suit ex-parte with cost thereby accepting the prayer made by the plaintiff and, on the other hand, it directs the defendants to pay the entire decretal amount within 30 days from the date of passing of the order failing which the plaintiff is given liberty to realize the decretal amount by filing of the execution case against the defendants. It is evident from considering the reliefs sought by the plaintiff that the relief sought was to issue a mortgage decree under Order 34 Rule 4 for Rs. 1,49,628.89 charging the said amount on the mortgaged properties and further prayer was made that on failure of the defendants to make payment within the period allowed by the Court, the decree Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 be made final and the decreed amount with future interest and cost of execution ordered to be satisfied by the sale proceeds of the mortgaged properties and in case the decreed amount with cost and interest is not satisfied by the sale proceeds of the hypothecated and mortgaged properties then the plaintiff be allowed to proceed against the person and other properties of the defendants for the balance amount and a decree for such balance be passed against all the defendants jointly and severally.

The decreeing of the suit ex-parte with cost thus amounted to accepting the prayer made by the plaintiff and further the only direction contained in the decree was to the defendants to pay the entire decretal amount within thirty days from the date of passing of the order as is not unusual but, of course, was not fully in keeping with the provisions of Section 34 Rule 4 in the prescribed form under the CPC and nothing further was provided therein apart from the direction to pay the decreed amount to the defendants within 30 days. Thus, it could not be said to be a composite decree which was not asked for in the plaint nor granted by the decree dated 21.4.1991. The decree itself does not provide that upon failure of the defendants to make the payments within the 30 days time granted, the plaintiff can get the mortgaged properties or sufficient part thereof, sold for the realization of the decretal amount nor it Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 provides that if the proceeds of the sale were insufficient, to pay the decretal amount and the balance of the legally recoverable amount from the defendants or against their person and property jointly and severally. In the said circumstances, it cannot be said that the decree dated 21.4.1995 is a composite decree. It is out and out a preliminary mortgage decree only under Rule 4 of Order 34 of the Code of Civil Procedure. Liberty to the plaintiff to realize the decretal amount through execution case against the defendants is clearly a wrong direction which should have no bearing on the rights of the parties under the law as laid down in the Code of Civil Procedure. The issue of jurisdiction raised herein by the plaintiff is to be considered accordingly keeping in view the fact that the decree in question is not a composite money decree as well as mortgage decree, rather it is a pure and simple preliminary

mortgage decree though not properly worded.

At this stage it is also essential to consider the import of Section 2(g) of the RDDBFI Act which, read with the other provisions of the said Act, makes it clear that the jurisdiction of a Debts Recovery Tribunal to entertain an application under Section 19 or even Section 31A would be dependent upon the debt itself, which may be a decree or order of any Civil Court, subsisting and being legally recoverable on the date of the application. Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 It may also be important to bear in mind that Section 31A has been introduced into the Act by the Amendment Act, 2000 with effect from 17.1.2000 which gives a liberty to the decree-holder in case of a decree or order passed by any Court before the commencement of the Recovery of Debts Due to Bank and Financial Institutions (Amendment) Act, 2000, i.e., before 17.1.2000 and which has not yet been executed, to apply to the Tribunal to pass an order for recovery of the amount. The said Section further provides that on receipt of an application under Sub- Section (1) of the said provisions, the Tribunal may issue a certificate for recovery to a Recovery Officer and on receipt of such a certificate the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a debt recoverable under the Act. The said provision has to be further read keeping the law laid down by the Apex Court in mind in the case of Punjab National Bank vs Chajju Ram & Ors.: (2000) 6 SCC 655 in which it was held that where an execution application has been filed as per the decree which had been passed for an amount over Rs. 10/- lacs then such application is to be treated as a proceeding pending in a Civil Court when the Act came into force and liable to be transferred to the Tribunal in accordance with Section 31 of the Act. It has further been held in the said decision that after the amendment, Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 provisions contained in Section 31A of the Act in case of decree being sought to be executed for over Rs. 10/- lacs, it is the Tribunal alone which should have jurisdiction of entertaining the application for execution and such amount of Rs. 10/- lacs would include any interest which had been allowed in the decree when the application for execution was filed; in case the said amount mentioned in the application for execution was more than Rs. 10/- lacs it can only be entertained by the Tribunal and not by the Civil Court.

In the present case, the execution had been sought in Case No. 05/1996 for an amount of Rs. 5,40,634/- by including the interest as allowed in the decree. Thus the said amount was less than Rs. 10 lacs and although the said execution case was pending on 17.1.2000 when Section 31A was introduced, it would not in terms of the aforesaid decision of the Supreme Court in the Punjab National Bank s case (supra) stand automatically transferred to the Tribunal as the amount in the execution case was less than Rs. 10/- lacs. That being the position, the question would definitely arise as to when on a subsequent date, on the basis of calculations made, the amount under the decree including the interest thereon exceeds Rs. 10/- lacs, whether an application under Section 31A (1) could be filed before the DRT or not.

Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 I have no hesitation in saying that it would be open to the Bank or Financial Institution to file an application under Section 31A(1) of the Act for a certificate for recovery if the amount in the application along with interest, etc. on the date of such application exceeds Rs. 10/- lacs but any such application would be subject to the law of limitation which has been made applicable under Section 24 of the RDDBFI Act, to an application made before

the Tribunal. It is also to be noted that filing of an application under Section 31A (1) would also be contingent upon the debt in question being subsisting on and legally recoverable on the date of the application.

In my view even a preliminary decree, if capable of quantification and still subsisting on the date of the application, can give rise to a right to file an application under Section 31A (1) of the Act. The proposition that a preliminary decree must become final before it can be executed as laid down in the decisions cited above by learned counsel for the petitioners, would apply in its full rigour only if such a decree is sought to be executed in terms of the provisions of the Code of Civil Procedure before the Civil Court. Since the rights of the parties are basically decided by the preliminary decree subject to the details being worked out in the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 final decree, therefore, the preliminary decree would also come within the ambit of the words "decree or order" as stated in Section 31A of the Act.

I have already held that the decree dated 21.4.1995 is not a composite decree but a preliminary mortgage decree under Order 34 Rule 4 of the Code of Civil Procedure. That being the position, the decree itself could not have been executed in the Civil Court without a final decree having been applied for and prepared in terms of the Order 34 Rule 5 of the Code of Civil Procedure providing for selling out of the mortgaged properties. In terms of the reliefs sought by the plaintiff and granted by the decree dated 21.4.1995, the decree could not have been further executed as a money decree against the defendants without first getting an order under Order 34 Rule 6 in case the sale of the mortgaged properties could not satisfy the decretal amount with interest and cost etc. Thus, according to me, the Execution Case No. 05/1996 was non est and invalid in law and could not have been carried into the effect as an execution because it was only for the execution of the preliminary mortgage decree without getting a final decree passed.

The preliminary decree dated 21.4.1995 directed the defendants to pay the entire decretal amount within 30 days from Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 the date of passing of the order. Thus an application for final decree ought to have been filed within a period of three years from the expiry of 30 days from the date of the order in terms of the settled position of law that Article 137 of the Limitation Act and apply to such an application for preparation of final decree. No such application having admittedly been filed within the period prescribed, it is evident that the right to apply for a final decree and get the same executed became barred after 21.5.1998. Thus on 17.1.2000 when Section 31A was introduced in the Act, there was no subsisting decree or order of the Court which could be executed under the law by the respondent-Bank. That being the position no right could accrue to the Bank merely because of enactment of Section 31A since the decree had become barred from execution by the passage of time and therefore could not form the basis for filing an application for an order of recovery under Section 31A (1). It was thus not open to the Debts Recovery Tribunal to have entertained the application filed by the respondent-Bank on 6.3.2006 and to have passed any valid legal order for recovery on the basis of such application.

The matter can be looked at from another angle also. When Section 31A was enforced on 17.1.2000, there was no execution proceeding praying for more than Rs. 10/- lacs pending in Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 the Court below as the prayer made by the Bank in its

execution case was only for an amount of Rs. 5,40,634/-. In such cases, Section 31A merely provides a right to the decree-holder in case of unexecuted decrees or orders to apply to the Tribunal to pass an order for recovery of the amount, provided the amount under the decree exceeds Rs. 10/- lacs on the date of the application. It is not mandatory under the provisions of Section 31A in case of such execution cases to stand transferred to automatically and proceeded with only by the Tribunal, it is rather a liberty granted to the decree- holder to apply to the Tribunal for recovery of the amount. Such a right accrued to the decree holder-Bank on 17.1.2000 and in the absence of any other specific provision, the residuary Article 137 of the Limitation Act would apply and such an application could only be filed within three years from the date when the right to file an application under Section 31A accrued. Thus, the Bank could have filed for a certificate for recovery of debt in the present matter with respect to the decree dated 21.4.1995, if the same was subsisting and recoverable on 17.1.2000, within a period of three years from the said date, i.e., on or before 17.1.2003. Thus the filing of the application in the year 2006 was obviously barred by limitation and could not have been entertained by the Debts Recovery Tribunal.

It may here be clarified that the period of Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 limitation of three years from 17.1.2000 may not be applicable to each and every case as I have already held above that the decree or order in question must be enforceable on the date of application and in case it loses its enforceability at any date prior to the passing of three years from 17.1.2000, then in such cases also no application under Section 31A would lie after such date even though three years from the date of enforcement of Section 31A has not passed.

In view of what has been held above, it is evident that the question of res judicata so far as the filing of successive execution cases is concerned, would lose all significance. However, in view of what has been decided by the Apex Court in the cases cited above, such successive applications for execution are not barred in case an earlier execution case had been dismissed for default subject, of course, to the period of limitation prescribed for filing an execution case.

I am also not in agreement with the submission of learned counsel for the petitioner that the death of the defendant no.3, mortgager who was also the father of the defendant no.2, petitioner no. 2 herein, would make the certificate invalid. The preliminary decree being a mortgage decree and the loanee defendant nos. 1 and 2 having a liability to clear the amount, the Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 certificate as a whole could not be said to be a nullity. Moreover, since the defendant no. 2 was represented before the Tribunal being the son of the deceased defendant no.3 it could not be said that estate of defendant No. 3 was not represented and therefore the certificate was invalid on that ground. However, in view of what has been decided by me, with respect to the non-enforceability of the decree, the said question has lost its significance.

I am also not in agreement with the submission of learned counsel for the petitioners that the false statement made in the application under Section 31A of the respondent-Bank, that no application for execution was filed earlier, would amount to fraud and misrepresentation of such dimension so as to vitiate the certificate. As already pointed out since successive execution applications are maintainable subject, of course, within the period of limitation, the fact that the earlier execution case had been dismissed for default not mentioned in the application under Section 31A, would not

have materially affected the result of the case. However, the same does amount to false statement on affidavit before the Tribunal which has been deemed to be judicial proceeding within the meaning of Sections 193, 228 and for the purpose of Section 196 of the IPC as also it has been deemed to be a Civil Court for all the purposes of Section 195 and Chapter 26 of the Code of Civil Patna High Court CWJC No.16665 of 2009 dt.11.12.2013 Procedure, 1973; under Section 22(3) of the RDDBFI Act the person who has sworn false affidavit before the Tribunal would be liable for proceedings for filing false affidavit on oath before it under the relevant provisions of law.

Thus, in the light of the aforesaid discussions, the writ application is allowed. The impugned orders dated 31.8.2009 and 19.4.2007 as also the recovery certificate issued by the Debts Recovery Tribunal, Patna in O.A. (Ex.) Case No. 15/2006 are quashed including the entire proceedings in the said case.

(Ramesh Kumar Datta, J) S.Pandey/-