
(2012) 12 BOM CK 0018
In the Bombay High Court
Case No : Writ Petition No. 2983 of 2006

Bank of India

APPELLANT

Vs

Growth Techno Project Limited and Others

RESPONDENT

Date of Decision : 12-12-2012

Acts Referred:

Citation : (2013) 3 ALLMR 373

Hon'ble Judges : S.J. Vazifdar, J;R.D. Dhanuka, J

Bench : Division Bench

Advocate : Prathamesh Kamat with Ms. Rajlaxmi Punjabi instructed by M.S. Bodhanwalla and Co, for the Appellant; K.D. Shukla instructed by K.D. Shukla and Co., for the Respondent

Judgement

S.J. Vazifdar, J.—The petitioner has challenged an order of the Debt Recovery Appellate Tribunal (DRAT) dated 12.6.2005 dismissing its appeal against the order of the Debt Recovery Tribunal (DRT) allowing only a part of its claim. The petitioner had filed Suit No. 3741 of 1998 in this Court against respondent Nos. 1 to 8, which stood transferred to the DRT. Respondent Nos. 2 to 7 are individuals. Respondent Nos. 2 (A), (B) and (C) are the heirs of original respondent No. 2. Respondent No. 8 is the Ghaziabad Development Authority. Respondent No. 9 is the DRAT.

2. The petitioner filed the suit to recover from respondent Nos. 1, 2 and 3, a sum of Rs. 14,17,56,313/- together with interest thereon at the rate of 20% per annum with half yearly rests from the date of filing of the suit till payment. The petitioner also sought a permanent injunction restraining the respondents from selling, assigning, gifting, leasing, charging or encumbering in any manner the immovable property described in Exhibit "E" till the amounts claimed were paid; an order restraining respondent No. 8 from transferring the property to anybody and a permanent injunction restraining respondent No. 1 from paying respondent Nos. 2 to 7 any amount till the amounts claimed were paid.

3. In August, 1995, the petitioner subscribed to the Non-Convertible Debentures

(NCB) issued by respondent No. 1 having a maturity value of Rs. 10.00 crores. A Subscription Agreement dated 23.8.1995 was entered into between the petitioner and respondent No. 1. The same confirmed that the NCD had a value of Rs. 100.00 each and were to carry interest at 18.5% per annum with half yearly rests. The maturity date of the NCDs was fixed on 22.1.1997. The agreement provided for security, consequences of default etc.

4. That the petitioner subscribed to the NCDs in the sum of Rs. 10.00 crores on the terms and conditions mentioned in the agreement is admitted. It is also admitted that the NCD certificates were issued by respondent No. 1 to the petitioner. It is not necessary to refer to the claims against the other respondents for they have been accepted to the extent of the amount awarded by the DRT. Suffice it to state that original respondent No. 2 and respondent No. 3 were held liable as guarantors and respondent Nos. 2 to 7 were held liable in respect of their commitment not to sell the said property, as also not to accept the money from respondent No. 1 till the petitioner's dues were paid. The respondents have not challenged the order of the DRT or the order of the DRAT before us. The only question therefore, is whether respondent Nos. 1, original respondent No. 2 and respondent No. 3 are liable to the full extent claimed in the suit/O.A. or whether they are liable only to the extent of the amounts awarded against them by the DRT viz. Rs. 5,43,00,000/- together with interest.

5. The petitioner's claim has been rejected only on one ground. It was held that the petitioner had paid only a sum of Rs. 5,43,00,000/- and not the sum of Rs. 4,47,00,000/-.

6. The error in the impugned orders arises on account of having misconstrued the manner in which the payment was made and the effect of a letter dated 22.9.1995, addressed by respondent No. 1 to the petitioner.

7. As we noted earlier, the execution of the Subscription Agreement is admitted. That the NCD certificates were issued is admitted. It is also admitted that the NCD certificates continued to remain with the petitioner without being discharged.

The DRT and the DRAT however, accepted the respondents' contention holding that out of the amount of Rs. 10.00 crores, a sum of Rs. 4,57,00,000/- was paid back by respondent No. 1 to the petitioner. It has been held that the said sum of Rs. Rs. 4,57,00,000/- was received back by the petitioner and remained unutilized by respondent No. 1. Before referring to the observations in the impugned judgment, it is necessary to set out the letter dated 22.9.1995 on the basis of which they were made. It reads as under:-

Dear Sir,

Ref: Non-Convertible Debentures issue--

Your Bank's Sanction Letter No. TRYD-SSM-2375

dated 22nd July, 1995.

With further reference to the aforesaid, your esteemed bank deposited with M/s. O.R. Khaitan & Co., Solicitors & Advocates the sanctioned, amount by way of two pay Orders favouring Ghaziabad Development Authority and amounting to Rs. 5,43,00,000/- and Rs. 4,57,00,000/- totalling Rs. 10,00,00,000/-.

1. In continuation to the same please find enclosed the letter No. OK-1130 dated 20.9.95 alongwith the Pay Order receive from M/s. O.R. Khaitan & Co., Solicitors & Advocates of Ghaziabad Development Authority, the contents of which are self-explanatory.

The same has been returned as because we have already raised Rs. 5 crores from our resources/market borrowings and paid the same to Ghaziabad Development Authority. Your Bank has already been provided with security totalling Rs. 20 Crore in parcel Nos. 3 and 4. As such, we now request you to cancel the Pay Order No. 021271 for Rs. 4,57,00,000/- crores favouring Ghaziabad Development Authority and credit the amount in the current account of M/s. Growth Techno Projects Ltd. with your Bombay Main Office.

8. The respondents admitted the amount of Rs. 5,43,00,000/- as having been paid by the petitioner to respondent No. 1 in respect of the said NCDs. The only dispute is with respect to the balance amount of Rs. 4,57,00,000/-. The pay order in the sum of Rs. 4,57,00,000/- from the petitioner to the Ghaziabad Development Authority was returned. Had the matter ended there, it could have been contended that the amount was never paid by the petitioner to respondent No. 1. The letter itself however, states that at the first respondent's request, the amount of the pay order viz. Rs. 4,57,00,000/-, was credited to the first respondent's current account. Thus the amount was paid by the petitioner to respondent No. 1 and respondent No. 1 received the same. It in fact operated the current account and utilized the said amount. We fail to understand how it could possibly be said that the petitioner had not paid the said amount to respondent No. 1. Whether the amount was paid to a third party viz. Ghaziabad Development Authority or whether it was credited to the first respondent's current account makes no difference. The fact is that respondent No. 1 was paid the said amount.

9. It is convenient to set out the submissions before the DRAT as recorded in its order and the observations of the DRAT in this regard. They read as under:-

5. The Defendants in their Affidavit have made categorically specific and positive statement that though the Agreement was to advance Rs. 10 crore towards the subscription of non convertible debenture, an amount of Rs. 4,57,00,00/- was not utilized and the same was returned to the Applicant Bank and as such the principal amount of Rs. 5,43,00,000/- was only taken by the Defendants No. 1 Company. It is pertinent to note that the Applicant Bank in its reply affidavit was absolutely silent on the point of receiving back a sum of Rs. 4,57,00,000/-. In fact, the Applicant Bank did not furnish the statement of account as required under the law. The Learned Presiding Officer therefore, directed the Applicant

Bank to state on Affidavit, whether or not a sum of Rs. 4,57,00,000/- was received back by them. The bank was also directed to furnish a proper statement of account. It appears that in compliance of these directions, affidavit Exhibit 35 came to be filed on behalf of the Applicant Bank, wherein it was stated that the Defendant No. 1 along with its letter dated 22/9/1995 had forwarded pay order No. 021271 for Rs. 4,57,00,000/- and had requested the Applicant Bank to credit the amount of said pay order to the current account of the Defendant No. 1. In view of this direction, the amount received under the said pay order was credited to the current account of the Defendant No. 1. The copy of the said letter received from the Defendant No. 1 to that effect was produced at Exhibit 66. The statement of accounts in respect of the current account to which the said amount was credited, was also produced at Exhibit 67.

The Defendant No. 2 however, filed another affidavit at Exhibit 72, in which it was reiterated by the Defendant No. 2 that the Applicant Bank had not filed proper statement of accounts. It was further stated that on the request of the Defendant No. 1 Company, the Applicant Bank had credited the amount of Rs. 4,57,00,000/- to the current account. As such, the said transaction was a in different and distinct transaction and the fact remains that the Applicant Bank had received back a sum of Rs. 4,57,00,000/-. It was pointed out that if there were any outstanding amount in the said current account, the Applicant Bank ought to have filed separate proceedings to recover those dues and since the said cause of action was totally separate cause of action, that could not have been mixed with the subscription agreement, after having received back the amount.

6. Having heard both the Advocates at length and having gone through the impugned judgement and order, so also relevant proceedings, I find myself in agreement with the submissions made by the Defendant's advocate.

7. It was contended by Mr. Satish Shetye, the learned Advocate appearing for the Appellants that the debenture certificates were still in the possession of the Applicant Bank and if the Defendants had repaid the amount to the extent of Rs. 4,57,00,000/- they would have demanded the certificates of equivalent value back. He further argued that since the Defendants failed to do so, it clearly meant that they were aware of the fact that the amount of NCD's were not repaid. This contention of Mr. Shetye is not acceptable. While the Defendants have not demanded certificates worth Rs. 4,57,00,000/- back, it would not be correct to say that the Applicants are entitled to recover the entire amount of Rs. 10 crores, despite the fact that an amount of Rs. 4,57,00,000/- was paid back from out of the said amount of Rs. 10 Crores.

It is undisputed that a sum of Rs. 4,57,00,000/- was received back and from their own showing the Applicant Bank had transferred the said amount to the current account of the Defendant No. 1. The Bank itself produced the statement of accounts of the said current account at Exhibit 67, which showed that on 23/9/1995, a sum of Rs. 4,57,00,000/- was credited to the said account. The

said account was a running account and the last entry dated 24/4/1997 showed the credit balance of Rs. 9,395.78 in favour of the Defendant No. 1 which means that the said amount of Rs. 4,57,00,000/- which was credited to the current account had been in fact repaid by the Defendants.

10. The error in the judgment is obvious. The fact that a pay order of Rs. 4,57,00,000/- was "received back" makes no difference. Admittedly, the proceeds thereof were credited to the first respondent's current account. The fact that this current account had a credit balance again makes no difference. The proceeds having been credited to the first respondent's account obviously enured to the benefit of the first respondent. The fact that an amount of only Rs. 9395=78 remained in the said account establishes that the first respondent utilized the entire amount therein. At the cost of repetition, it makes no difference where the amount in respect of the NCDs was credited so long as it was credited in favour of or paid to the credit of the first respondent. The DRAT does not hold that the petitioner utilized the funds in the first respondent's current account. There is nothing in the order that suggests that the petitioner had the benefit of the amount in the first respondent's account.

11. The order of the DRAT cannot be upheld.

12. It is also necessary to note that the DRT did hold that the amount was transferred to the current account of the first respondent but went to hold that a separate suit to recover the amount which may be due at the foot of that account i.e. the current account ought to have been filed.

13. The error in this finding is that the suit was not at the foot of or even based on the current account. It was not necessary for the petitioner to file a suit on the basis of the current account. The petitioner merely credited the amount due in respect of the NCDs to the current account. In other words, the first respondent received the amounts towards the NCDs in its current account. The suit was therefore, rightly brought to recover the amounts due in respect of the NCDs on the maturity thereof. There is no question of the petitioner having unjustly enriched itself as observed by the learned chairperson of the DRAT.

14. In the circumstances, rule is liable to be made absolute in terms of prayer (a). As a consequence, the petitioner's suit/O.A. would have to be allowed as prayed. The respondents have not challenged the order of the DRAT. In the circumstances, it would not be open to us to vary the order in favour of the respondents.

15. The petitioner had not pressed Chamber Summons No. 63 of 2009 for bringing the heirs of respondent No. 6 on record. The same does not affect the petitioner's claim against the other respondents. The writ petition is therefore, disposed of by the following order:-

i) Rule is made absolute in terms of prayer (a).

ii) The impugned order in so far as it is in favour of the petitioner stands and is

confirmed.

iii) In addition thereto, there shall be an order directing respondent Nos. 1, 2-A, 2-B, 2-C and 3 to pay the petitioner jointly and severally a sum of Rs. 4,57,00,000/- with interest thereon at the rate of 18.5% per annum compounded quarterly from 22.1.1997 i.e. the date of maturity till the date of the filing of the suit and thereafter at the rate of 10% per annum till payment. Respondent Nos. 2-A, 2-B and 2-C, however, shall be liable only to the extent of the estate coming to their hands.

iv) Order in terms of prayers (b) and (c) of the plaint/O.A. in respect of the amount allowed by the DRT/DRAT and by this order and judgment.

v) There shall be no order as to costs.