**(2011) 10 KAR CK 0061**

**In the Karnataka High Court**

**Case No :** Writ Petition No. 16202 of 2005 (GM-DRT)

Canara Bank APPELLANT

Vs

M/s. Computer Data Application Pvt. Ltd. and Others RESPONDENT

**Date of Decision :** 21-10-2011

**Acts Referred:**

**Citation :** (2011) 10 KAR CK 0061

**Hon'ble Judges :** Vikramajit Sen, Acting C.J.;A.S. Bopanna, J

**Bench :** Division Bench

**Advocate :** Padubidri Raghavendra Rao, M/s. Mohan Rao and Associates, for the Appellant; S Sugumaran, for R4, R1 to 3 - proceeded against ex-parte v/o dated 07.06.2011, R6 and 7 Served. R5 -notice dispensed with, for the Respondent

**Final Decision :** Allowed

# Judgement

1. The petitioner-Bank is before this Court in this writ petition being aggrieved by the order dated 30.09.1999 passed by the Debts Recovery Tribunal, Bangalore (''DRT'' for short) in O.A. No. 778/1995 insofar as not allowing the application against the third respondent. The petitioner is also aggrieved by the order dated 12.10.2004 passed by the Debts Recovery Appellate Tribunal, Chennai (''DRAT'' for short) in R.A.No. 3/2004 upholding the order of the DRT.

2. Heard Sri Mohan Rao, learned counsel for the petitioner and Sri S. Sugumaran, learned counsel for the fourth respondent and perused the petition papers including the records received from the DRT. Respondent Nos. 1 to 3 have not responded to the notice and are placed ex-parte. Respondent Nos. 6 and 7 though served are unrepresented, who are in any event not necessary parties. Notice to respondent No. 5 had been dispensed at the request of the petitioner.

3. In a suit instituted by the petitioner in O.S.No. 2732/1992, which was later transferred to the DRT and registered as O.A.No. 778/95, the petitioner had sought for recovery certificate against defendant. Nos. 1 to 5 (Respondent Nos. 1 to 5 herein). The DRT by its order dated 30.09.1999, though has allowed the

application as against the respondent Nos. 1, 2, 4 and 5, has dismissed the claim against respondent No. 3 as barred by time. The DRAT has confirmed such finding. Hence, the instant petition lies in a narrow compass, limited only to that aspect of the matter relating to the exclusion of respondent No. 3 and to determine as to whether the DRT and DRAT were justified in that regard. It is nouced that the other respondents did not contest the proceedings and it is only the third respondent who had entered appearance, filed written statement and contested the suit.

4. Out of the two points which were raised for consideration by the DRT, the first point was for the petitioner-Bank to establish that the defendants were liable to pay the amount, which in any event is held in the affirmative. By the second point raised, the burden was cast on the third respondent as follows:

(ii) Whether the third defendant proves that he has executed the bank guarantee only for Rs. 4 lakhs and the claim is barred by limitation?

5. The third respondent in order to discharge the burden has not relied on any documentary evidence. Towards the ocular evidence, he had relied on the affidavit filed in that regard. He was subjected to cross-examination which is brief and reads as hereunder:

I have not intimated to the bank about my resignation from the 1st defendant in 1983. It is not correct to say that defendant No. 2 was not at all in the panel of Chartered Accountant of defendant No. 1. I admit execution of all documents upto the date of my alleged date of resignation in the year 1983. I have no documents to show that the 1st defendant was taken over by M/s PSI data system.

6. Having noticed the above cross-examination, where there is admission regarding execution of documents upto 1983, a reference to the primary contention put forth by the third respondent in his written statement and the affidavit evidence would indicate the contention is about the third respondent not being party to the loan except for the sum of Rs. 4 lakhs advanced on 04.01.1978. The said contention in any event has been negatived by DRT taking note of the continuing guarantee which was marked as Ex.A.30(a). Thereafter the DRT has adverted to the aspect relating to limitation. The petitioner-Bank has relied on the documents marked as Ex.A.32 to 45 which are letters acknowledging the debt. The said acknowledgment of debt (Ex.A32 to 45) was no doubt signed only by the second respondent and the third respondent has not affixed his signature. Though that was urged as defence by the third defendant, the DRT has not accepted such contention and it has been held that it is not necessary for all the guarantors to sign. The said finding has attained finality as the third respondent has not assailed the same.

7. Despite the above, the DRT has exonerated the third respondent only on the ground that the said acknowledgment of debt does not relate to the loan account regarding which the recovery suit has been filed. The fact that said documents

 

Ex.A.32 to 45 refers to Term Loan 6/78, CD account and ML 1/81 is not in dispute. While filing the suit, the petitioner-Bank has indicated the reference as LPD No. 17/89, 18/89 and 19/89 towards the suit claim. The DRT therefore referring to the evidence of AW-3 and AW-4 has held that they have not stated that the acknowledgment relates to the same transaction and therefore, it has arrived at the conclusion that the suit is barred by limitation against the third respondent. The said conclusion was reached since the transactions were depicted as LPD No. 17/1989 (Term Loan). LPD No. 19/89 (Term Loan) and LPD No. 18/89 (OD Account) in the plaint and the statements of account which were marked.

8. The contention of the learned counsel for the petitioner is that it is the very same transaction but for administrative reason, it is assigned the said number as Loan Passed Due (LPD), but the body of the statements of account makes reference to the actual transaction viz., M.L.No. 6/78. Ml No. 1/81 and O.D. Account. On the same materials available on record, the recovery certificate has been granted against the other defendants and the very same acknowledgment of debt has been accepted as valid for the purpose of limitation.

9. Foremost, a perusal of the plaint indicates that the transactions referred with regard to the term loan and the O.D. facility are all dated 04.01.1978, 24.10.1979, 18.12.1980, 19.12.1980, 26.05.1981 and the documents were executed relating to the same. The cross-examination of the third respondent extracted supra would admit the execution of documents upto 1983. Though one other O.D. facility is on 05.01.1985, the same is covered by the continuing guarantee. This position is similar to the position as held by a Division Bench of this Court in the case of K.G. Subbarama Setty -vs- Kotak Mahindra Bank Ltd., and Ors [ 4 (2010) BC 4 (DB)]

10. The plaint further refers to the acknowledgment of debts issued in respect of the said transactions with reference to the different dates on which the acknowledgments of debt were executed and states that the defendants were chronic defaulters and in that regard, the suit is filed. Thereafter while quantifying the amount., the LPD numbers have been mentioned. A conjoint reading of the plaint indicates that the entire claim is based on the very transaction in the year 1978 and onwards which have been referred above and the amount claimed as LPD numbers are not of a different transaction. Further, the third respondent in his written statement has not taken a defence in the nature as made out by the DRT at the present juncture. The nature of defence put forth by the third respondent has already been referred to above and the same does not indicate as specific defence to contend that the present claim made is not relatable to the transaction to which the third defendant was a party. As noticed, the main defence was that he was party to only the first loan of Rs. 4 lakhs and his guarantee is limited to that extent. That defence has in any event been negatived by the DRT.

11. In the above context, when there was no specific defence on that aspect of

the matter and when no specific issue was formulated in that regard, the DRT was not justified in stating that the witnesses AW.3 and AW.4 had not stated that the acknowledgment relates to the accounts of the third respondent. In fact the DRT has held that the acknowledgment by one of the guarantors would be sufficient and if this is kept in view, the acknowledgment signed by one of the guarantors refers to ML No. 6/78, OD Account and ML No. 1/81. The statement of account which has been marked as Ex.A.47, A48 and A49 in fact refer to the said account number in the opening entry though at the top of the sheet, the LPD numbers have been indicated. When in such circumstance, the third respondent has not taken a defence that the acknowledgment of debt at. Ex.A3 2 to A45 relate to a different transaction and that the claim made is against some other independent transaction, the DRT is not justified in holding that the said documents do not link to the account of the third respondent just because the third respondent had contested the proceedings. As noticed above, the Tribunal in fact has answered the first point in favour of the Bank as against the other respondents based on the very same set of documents and therefore, the reason assigned so as not to include the third respondent for allowing the application on the ground of limitation is not justified. While parting from the matter, though it is noticed that the fourth respondent has filed a memo along with a letter addressed by the petitioner/Bank to the fourth respondent, whereby the fourth respondent has been excluded from the recovery proceedings, it is not necessary for us to modify the order of the DRT in that regard, in the instant petition which is filed by the Bank. It is for the fourth respondent to rely on the said letter before the appropriate forum, if the recovery proceedings is initiated against the fourth respondent.

12. In the result we pass the following:

ORDER

i) The order dated 12.10.2004 passed by the DRAT in R.A. No. 3/2004 is set aside.

ii) The order dated 30.09.1999 passed by the DRT in O.A.No. 778/1995 is modified by allowing the application against the defendant Nos 1 to 5.

iii) The writ petition is allowed in the above terms.

 