

(2014) 11 DEL CK 0320

In the Delhi High Court

Case No : Writ Petition (Civil) Nos. 8075/2014, 8077/2014 and 8138/2014

Continental Construction Ltd.

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 24-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 32

Citation : (2014) 11 DEL CK 0320

Hon'ble Judges : V. Kameswar Rao, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : V.P. Singh, H.L. Tiku, Sr. Advocates, Vinay Sharma, Bhowmik Nayyar and Amit Dhupar, Advocate for the Appellant; S.L. Gupta and J.P. Gupta, Advocate for the Respondent

Judgement

Sanjiv Khanna, J.—Counsel for the petitioners have been informed that wife of one of us (Sanjiv Khanna, J.) is holder of some shares of the State Bank of India. Counsel for the petitioners state that they have no objection to the present Bench hearing these writ petitions.

2. The only issue and contention raised in the present writ petitions is whether the petitioners should be given liberty to cross-examine witnesses of the respondent bank in the original applications filed under the Recovery of Debts Due To Banks and Financial Institutions Act, 1993. These original applications are listed for final hearing before the DRT.

3. These writ petitions arise out of a common order passed by the Debt Recovery Appellate Tribunal (DRAT, for short) dated 10th October, 2014 disposing of Miscellaneous Appeal No. 380/2014 titled M.S. Basi versus State Bank of India and Others and Miscellaneous Appeal Nos. 379/2014 and 378/2014 titled M/s. Continental Construction Limited versus State Bank of India. These appeals arose from orders passed by Debt Recovery Tribunal (DRT, for short) on applications filed by the petitioners in OA Nos. 37/98, 38/98 and 39/98.

4. Respondent bank-State Bank of India had filed the aforementioned Original Applications way back in 1998, for recovery of Rs. 89, 21,25,119, Rs. 3,90,00,956 and Rs. 77,35,911, with pendente lite and future interest from M/s. Continental Construction Limited i.e. the principal borrower, and others. M.S. Basi, as a guarantor, has been impleaded in OA No. 38/98, but he is not a party/defendant in OA Nos. 37/98 and 39/98.

5. The respondent bank had filed evidence by way of affidavit in OA No. 39/1998 way back in 2002 and the petitioner M/s. Continental Construction Ltd. i.e. the principal borrower had filed the evidence by way of affidavits in April, 2004. In OA No. 37/1998, evidence by way of affidavit was filed by the respondent bank in March, 2012 and by the petitioner, M/s. Continental Construction Ltd., and others in May, 2012. In OA No. 38/98, evidence way of affidavit was filed by the respondent bank in September, 2011 and thereafter, evidence was filed by the principal borrower M/s. Continental Construction Ltd. and the guarantor M.S. Basi in February, 2012 (See order dated 15th September, 2014, passed in W.P(C) No. 6090/2014).

6. Apparently, when OA No. 38/98 was fixed for final arguments, M.S. Basi filed an application in March, 2012 for cross-examination of the deponents who have filed affidavits in support of the claim for recovery by the respondent bank.

7. Subsequently, an application was filed by M.S. Basi for consolidation of three OAs in 2014. Certain orders passed thereafter, became subject matter of Writ Petition (Civil) No. 6090/2014 decided by this Bench on 15th September, 2014 holding that the three OAs could be taken up for hearing separately. This order also notices the earlier directions given by the High Court in Writ Petition (Civil) No. 7758/2010 vide order dated 5.9.2011 that the parties should lead evidence before the DRT and OA No. 38/1998 would be disposed of within six months. The said direction was passed with consent. Thereafter the DRAT had passed order in an appeal arising from OA No. 37/1998 to a similar effect.

8. M/s. Continental Construction Ltd., in year 2014, filed applications for cross-examination of the deponents who had filed evidence by way of affidavits in support of claim of the respondent bank, in OA Nos. 37/98 and 39/98.

9. The DRT by their order dated 22.9.2014, rejected these applications observing that there was no reason that necessitates or requires cross examination of bank's witnesses and applications had been filed to delay the disposal of the OAs. Petitioners then approached the DRAT, but the prayer for cross-examination stands rejected by the impugned order dated 10.10.2014.

10. We have examined the applications, filed by M/s. Continental Construction Ltd. in OAs 37/1998 and 39/1998 which are almost identical. The said applications make reference to three written statements setting out defences, and aver that there are substantial defences against the claim of recovery. It is urged and claimed that the documents in support of defences have been filed by M/s. Continental Construction Ltd. The defence, it is asserted, is fully established

by the evidence on record. M/s. Continental Constructions Ltd. somewhat irreconcilably prayed that it was necessary to cross-examine the deponents who had filed evidence by way of affidavit in support of the claim of recovery. The relevant portion of the application is reproduced below:-

"4. As stated, the Defendant No. 1 has raised substantial defences in the Written Statement and besides dealing with the said specific averments in the parawise reply has also shown /established inter alia to the effect that the alleged facility in the present O.A. cannot be segregated from the alleged Overdraft facility at U.K. which was in fact a financial help extended by the Applicant Bank to the Government of Iraq at the behest and instance of the Government of India by virtue of the Unilateral Deferred Payment Agreements entered into between the Government of India and the Government of Iraq; the Defendant was merely a conduit; the amounts to be recovered, if any, were to be recovered by the Applicant Bank from the receivables under the said Deferred Payment Agreements; the Defendant was put under commercial duress and coercion and undue influence for the purposes of routing the said financial assistance through it; the said Deferred Payment Agreements and the illegal and arbitrary acts of the Applicant Bank caused grave losses to the Defendant which the Defendant is entitled to recover jointly and severally from the Applicant Bank, the EXIM Bank and ECGC and the Government of India; the alleged conversion of the alleged foreign exchange borrowing to Rupee denominated amounts was unilateral and illegal; the Applicant Bank and EXIM Bank acting in concert with each other exercised commercial duress, coercion and undue influence to get the alleged Deferred Payment facility signed from the Defendant and therefore, the said alleged documents are null and void and that the Applicant-Bank and EXIM Bank were not entitled to charge any interest above LIBOR and were in any event entitled to recover the amounts only from the project receivables under the Deferred Payment Agreements. The alleged statement of account has also been denied and a relief of set off has also been sought in the alternative.

5. That the documents in support of the aforesaid defences have also been filed by Defendant No. 1. The defences raised have neither been met with in the Affidavit of evidence nor any Replication has been filed by the bank."

11. In the application filed by M.S. Basi in OA No. 38/1998, it is claimed that the said defendant was under commercial duress and coercion and due to undue influence was made to execute some documents. It was claimed that the guarantees given by M.S. Basi stand discharged.

12. The petitioners before us submit that the facts relating to commercial duress, coercion and undue influence raised by M.S. Basi in OA No. 38/1998, which the petitioners wish to prove, can only be so established by cross-examination of the bank's witnesses. The deferred payment agreements were arbitrary and illegal and therefore null and void. Petitioners contended that the alleged financial facility was not obtained by them voluntarily but was extended by the respondent bank to Government of Iraq at instance of the Government of India

in terms of unilateral deferred payment agreement. M/s. Continental Construction Ltd. was merely acting as a conduit, so the amount, if any, payable should have been recovered from the receivables under the deferred payment agreement and not from the petitioners.

13. The DRAT, while dismissing the appeals, has referred to Rule 12(7) and 12(6) of the Debts Recovery Tribunal (Procedures) Rules, 1993 and observed that Rule 12(7) provides that when a defendant denies his liability to pay the claim, the Tribunal can rely upon the affidavits of the defendant/person acquainted with the facts. The said rule nowhere provides for oral examination of a witness. Rule 12(6) provides that the tribunal can at any time for sufficient reason order that any particular fact may be proved by way of affidavit. Proviso to this sub-rule makes reference to cross-examination of a witness. Tribunals do have the power to summon and enforce the attendance of any witness and examine him on oath, but no provision makes it mandatory that the witness should be examined orally or cross-examined on oath. Good and sufficient cause must be shown before a request for cross examination of a witness could be allowed.

14. The DRAT then referred to the ratio expounded by the Supreme Court in Union of India and Another Vs. Delhi High Court Bar Association and Others, , and has quoted the following paragraph:-

"23. In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order that the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to Rule 12(6) would certainly apply only where the Tribunal chooses to issue a direction on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or a defendant for the production of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, if it appears to the Tribunal, that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226 and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before them ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be

sufficient."

15. The DRAT, elucidating and on examining the contentions observed that cross-examination of bank's witnesses would be of no help to the petitioners to bring on record the aspects which they want to establish. The petitioners have full liberty to prove any of their contentions, by leading their own evidence. Petitioners have not been able to show in any manner that there were sufficient reasons or cause for summoning the bank's witnesses for cross-examination.

16. We are in agreement with the findings recorded by the DRT and DRAT on the issue of cross-examination of the witnesses of the respondent bank. We do not think any ground or reason has been shown or made out to permit such cross-examination. The decision of the Supreme Court in Delhi High Court Bar Association (*supra*) in categorical terms holds that the desire of cross-examination has to be legitimate and for justification and cause shown. No valid justification or cause has been shown. We have also already noted that the applications were filed at a stage when the cases were fixed for final hearing and disposal.

17. Counsel for the petitioners have submitted that certain letters were exchanged between the petitioners and the respondent bank due to situation in Iraq. It is further submitted that certain payments have not been duly accounted for. On behalf of M/s. Continental Construction Limited, it is submitted that certain documents, including bank guarantees are not on record.

18. Learned counsel appearing for the respondent bank who is present on advance notice states that full credit has been given for the payments made and there is no discrepancy. He denies other allegations and contentions. He states that copy of the Original Applications filed as an annexure to the writ petitions, are incomplete.

19. We have considered the said contentions, but do not find any ground or justification to interfere with the impugned order in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India. The subject matter before the DRAT was rather limited and confined to whether the petitioners herein should be given right to cross-examine the bank's officers, who had submitted affidavits. The primary contention raised before the DRAT was that due to economic and financial compulsions certain consents were given, but these cannot be treated and regarded as valid consents. Request for cross-examination on the said ground has been rightly rejected. The question of amount due and payable and whether credits have been given for all the payments made is a matter of details and merits. The said aspects need not be examined in these writ petitions. The petitioner can always rely upon their affidavits, documents etc. filed by them in support.

20. We clarify that the observations made by the DRAT in the order dated 10th October, 2014 were for the purpose of disposal of the application for right to cross-examination and these should not be construed as conclusive and binding

findings when the DRT finally examines and decides/adjudicates the case of the bank and the petitioners on merits. The aforesaid observations will equally apply to the orders passed by the DRT while disposing of the applications for cross-examination. Learned counsel for the respondent bank has referred to the judgment dated 26th September, 2014 in Writ Petition (Civil) No. 7122/2012 titled State Bank of India versus M/s. Continental Construction Limited and Others. The effect and the ratio of the said judgment can be examined by the DRT.

21. The writ petitions are accordingly disposed of.