
(2010) 04 DEL CK 0073

In the Delhi High Court

Case No : Writ Petition (C) No. 9200 of 2007

PG Foils Ltd.

APPELLANT

Vs

Bank of Rajasthan Ltd.

RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2010) 3 BC 170

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Naveen Sharma and Swati Bhushan Sharma, for the Appellant; R.P. Aggarwal, A.K. Singh and Sandhya, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—This petition under Articles 226 and 227 of the Constitution of India challenges the impugned judgment dated 19.11.2007 of the Debt Recovery Appellate Tribunal (DRAT) whereby the DRAT dismissed the appeal of the petitioner against the judgment of the Debt Recovery Tribunal (DRT) dated 12.7.2004. By the judgments, both the DRT and DRAT, have allowed the claim of the respondent bank herein and have granted a decree for the amount of Rs. 21,20,466/- plus interest @ 13.5% per annum from 31.12.1995 to 6.3.1998 and pendente lite and future interest @ 11% per annum.

2. The case, the issue and the conclusion in the present case as urged by the counsel for the petitioner and which we accept, is that there was no reason for the petitioner to take a loan in the form of an over draft in the current account maintained with the respondent bank when the respondent bank had in fact fixed deposits of the petitioner lying with it and which amounts should have been credited to the current account for clearing of the refund orders issued by the petitioner company and which action the respondent bank ought to have taken in terms of the Agreement between the parties.

3. The facts of the case are that the petitioner company came out with a public issue in 1994 and the issue was over-subscribed. The petitioner, therefore, requested the respondent bank to act as a banker for refund of the amount of the over-subscription to the unsuccessful applicants of the shares. For this purpose, two documents were executed between the parties being the Agreement dated 7.3.1995 entered into between the parties and the letter dated 17.2.1995 addressed by the respondent bank to the petitioner and which also incorporated the agreed terms. Before proceeding further, it is necessary to reproduce certain important terms between the parties in the aforesaid two documents and which are as under:

Para 3 of letter dated 17.2.1995

3. That at least before 10 days prior to issue of the Refund Orders, the total amount to be refunded should be remitted to us which will be utilized by us as under:

a. A sum equivalent to the amount to be refunded by the branches of Union Bank of India will be paid well in advance to Union Bank of India and no interest will be payable on the same.

b. After appropriating the amount as above, the sum will be kept in FDR's for shortest maturities. The bank will have the discretion to transfer the amounts of FDR by making before maturity payment of such FDRs to meet the payment of refund orders and to keep minimum balance in Current A/C. Interest will be paid on such FDRs as per RBI guidelines. You will be availing 100% overdraft against these FDRs which will be utilized for honoring the refund orders only. The rate of interest recoverable on over draft will be 13.5%.

Articles 3 & 7 of Agreement dated 7.3.1995

Article 3 That the company shall not be liable to pay any cost, interest service charges to the Banker Union Bank of India for services as mentioned in the Article 2, which will be operating and getting charges from the Bank of Rajasthan Ltd. as per their agreed terms and conditions.

Article 7 That the Banker will have the discretion to transfer the refund amount in one term deposits of any value or of any maturity out of the total refund amount transfer to it by the Company without seeking any instructions from the company.

4. Admitted facts are that the petitioner company deposited the entire amount required for clearance of the refund orders issued to the unsuccessful applicants of the shares in the public issue and this amount was kept in a fixed deposit by the respondent bank with itself. Certain amount, however, was not to be kept in a fixed deposit out of the amount paid by the petitioner to the respondent bank and this amount was to be credited to the current account of the petitioner as per para 3(b) of the letter dated 17.2.1995 reproduced above. The refund orders when presented to the respondent bank or its associates would be cleared from

the balance as lying in the current account. The current account was always to have adequate balance in its credit so that the refund orders could be encashed. From time to time, the respondent bank had to transfer the amount from the fixed deposit amount lying with it to the credit of the current account so that the refund orders could be encashed and the current account could be debited with the amounts of refund orders presented for encashment. As already stated para 3(b) of the letter dated 17.2.1995 reproduced above makes this more than absolutely clear. This fact also becomes additionally clear when we refer to Articles 3 and 7 of the Agreement dated 7.3.1995.

All the above facts and the relevant clauses had a specific purpose because unless there is necessary credit in the current account, the refund orders would not have been encashed. The need for the over draft in the current account i.e. taking a loan from the bank for encashing of the refund orders would only arise if there were not sufficient amounts available with the respondent bank for being credited to the current account i.e. the amounts of fixed deposit lying with it were not sufficient to cover the amount of the refund orders.

The admitted case is that at no point of time the value of the refund orders exceeded the amount of the fixed deposit lying with the respondent bank.

5. The respondent bank sent a legal notice dated 2.1.1998 to the petitioner company and alleged that on account of reconciliation in its books of account, an amount of Rs. 35,44,404/- was due to the respondent bank alongwith interest. This claim was made because the respondent bank averred that an over draft came into existence in the current account on account of encashment of the refund orders and which carried interest @ 13.5% per annum. It was contended that since the fixed deposit of the petitioner with the respondent bank earned only 11%, therefore, because of this difference of the rate of interest of 2-1/2% per annum, the amount of Rs. 35,44,404/- became payable. It may be noted that this amount of Rs. 35,44,404/- however was reduced when the claim was filed by the bank before the DRT wherein only an amount of Rs. 32,14,985/- was claimed being due as on 28.2.1998. The petitioner replied to the legal notice by its reply dated 22.1.1998 and denied the claim of the bank. Before the DRT, besides raising other contentions, the petitioner contended that there was no reason for the bank to give an over draft in the current account because the bank should have transferred the amount from the fixed deposits in case the current account did not have the requisite amount for encashment of the refund orders, though the defence one must say was not very happily worded. Some of the relevant paras of the written statement are as under:

Preliminary Objection No. 6 That from a bare reading of the notice of the applicant bank, the demand is alleged to have been Rs. 35,44,404/-, whereas the present application has been filed claiming the demand for Rs. 3214985/-. That the applicant bank is not entitled to claim any interest because there is no clause for charging interest in the agreement and the applicant bank has not charged interest in case of another company known as La Medical Limited, who

had also taken out a similar public issue where also the applicant bank was a refund banker. The Bank has charged interest on daily period on amount received by them without considering that substantial credit balance available at Branch in the account of the respondent company. Without conceding the rate to charge the interest, it is submitted that the bank has charged interest @ 13% whereas it should be 11% as if the bank timely debited the amount and interest to account of the company the company would not have renewed the FDR at 11%.

Preliminary Objection No. 1 That the respondent submits that the Hon'ble Tribunal has got no jurisdiction to entertain and decide this petition. That the respondent had taken out a public issue on 22.12.1994 and the respondent appointed the applicant bank as the refund banker to refund the over-subscription amount which was received by the respondent company against the public issue. That it was purely a service contract between the applicant and the respondent company which is an incidental activity of the public issue. According to the agreement for making arrangement to refund the over-subscribed amount, the respondent company kept the fund in the fixed deposit for shortest maturity periods with the applicant bank and against fixed deposit, the applicant bank agreed to provide 100% overdraft to be utilized for payment of refund orders. That there was neither a relationship of creditor and debtor between the parties and the amount was not a debt which has been claimed by the applicant.

Preliminary Objection No. 4 That the applicant bank is also illegally claiming interest for the periods between the actual payment of refund order by the designated branches and the date of debit by the applicant bank which, according to the applicant bank comes to Rs. 2120466/-. It was an internal arrangement between the applicant bank and the designated branches wherein it was clearly mentioned as per letter addressed to the respondent company as per Clause 3(a) "a sum equivalent to the amount to be refunded by the branches of Union Bank of India will be paid in advance, to Union Bank of India and no interest will be payable on the same.

6. A reading of the order dated 12.7.04 of the DRT shows that the DRT failed to determine and decide this vital defence of the petitioner that there was no need to create an over draft in the current account because by virtue of the letter dated 17.2.1995 and the Agreement dated 7.3.1995, the respondent bank was bound to automatically transfer the amount from the fixed deposit to the credit of the current account for the encashment of the refund orders, because if credit was made available in the current account by transferring the amount from the fixed deposit, there would not have arisen the need for an over draft in the current account carrying interest @ 13.5% per annum. The DRT, however, does mention Clause 3(b) of the letter dated 17.2.1995 which has been exhibited as Ex.AW1/2, however, this relevant clause has been read in an absolutely opposite manner. The following observations which have been made by the DRT in paragraph 9 of its judgment dated 12.7.04 reads as under:

As per Clause 3(b) of this exhibit, it has been specifically stated that the

defendant will be availing 100% overdraft against these FDRs which will be utilizing for honouring the refund orders only. The rate of interest recoverable on overdraft will be 13.5% p.a. So, in my opinion, the contention of the defendant that the applicant bank cannot realize the interest more than 13.5% is correct. The applicant bank has not specifically clarified in their replication that instead of charging interest 13.5% p.a., why they have charged interest @ 20% or 24%. I am convinced by the arguments advanced by the Counsel for defendant that the interest charged should have been 13.5% p.a. in the light of the above discussion, I am convinced that the applicant bank has succeeded in proving its case against the defendant. There is no reason to disbelieve the evidence filed by the applicant bank because the same has been filed by way of affidavits of its officials. The affidavit of officials who belong to government run public banks & financial institutions has to be given weightage because there is no vested interest involved for them to depose falsely. On the other hand, defendant who has filed its affidavit has its vested interest being a borrower.

Once the overdraft facility has been availed from the bank/financial institution, they cannot shy away from their responsibility to repay the same. Moreover, the defendant has not stated in the affidavit that the deponent bank officer is having any enmity with them. Rest of the pleas of the defendant are not convincing.

7. The impugned order of the DRAT dated 19.11.2007 in fact does not even discuss the stand and argument of the petitioner that there was no need of an over draft in the current account inasmuch as there was already enough amount of the petitioner available with the respondent bank in the fixed deposit and which amount ought to have been transferred to the credit of the current account obviating the need for creating an over draft in the current account.

8. Before us, the counsel for the respondent bank had no answer to the categorical language used in para 3(b) of the letter dated 17.2.1995 and Articles 3 and 7 of the Agreement dated 7.3.1995, however, an ingenuous argument was sought to be raised that it was the "discretion" of the respondent bank that it would or would not transfer the amount from the fixed deposit to the credit of the current bank. No doubt, this argument is both ingenuous and novel, however, we are least impressed by it. Of course, the clause uses the word "discretion" but that expression is used not in the sense of an option to the respondent bank but to ensure that amount is in fact transferred to the credit of the current account. The following line in para 36 of the letter dated 17.2.1995 is quite categorical in that the object of FDR is to ensure that there is kept a minimum balance in the current account for encashment of the refund order:

The bank will have the discretion to transfer the amounts of FDR by making before maturity payment of such FDRs to meet the payment of refund orders and to keep minimum balance in Current A/C.

Assuming that there was any doubt, the same is cleared by Article 7 of the Agreement dated 7.3.1995 as also Article 3 and which Articles specifically state

that the petitioner company shall not pay any interest charges to the respondent bank and that credits will be made in the current account without seeking instructions from the petitioner company.

9. In sum and substance, it is quite clear that the respondent bank failed in its duty in adhering to para 3(b) of the letter dated 17.2.1995 read with Article 7 of the Agreement dated 7.3.1995 and failed to transfer amount from the fixed deposit to the credit of the current account and instead created an over draft in the current account and on which interest was claimed at 13.5% per annum though the respondent bank had with it all along the requisite amount for encashment of the refund orders in the form of fixed deposit given by the petitioner to the respondent bank, and which fixed deposit by virtue of the language of the clauses of the letter dated 17.2.1995 and the Agreement dated 7.3.1995 was for the purpose of transferring such amount in the current account so that the refund orders could be encashed. The respondent bank to serve its own purpose has illegally and arbitrarily failed to transfer the amount from the fixed deposit to the credit of the current account and instead has created an over draft in the current account for claiming the differential rate of interest of 2.5% per annum inasmuch as in the fixed deposit it was giving interest @ 11% per annum but in the over draft account it was charging interest @ 13.5% per annum.

10. In our opinion, the entire action of the respondent bank is highly illegal and uncalled for and appears to be a clear attempt to unnecessarily take benefit by creating an over draft in the current account whereas by virtue of the provisions of the Agreement between the parties it was bound to, but yet it failed to, transfer the amount from the fixed deposit to the current account.

11. The counsel for the respondent bank finally attempted to argue that this Court should not interfere in its jurisdiction under Article 226 and 227 of the Constitution of India because these were disputed questions of facts and this Court should not exercise jurisdiction in view of the two orders of the two authorities below which have ruled in favour of the respondent bank. At the first blush, this argument may appear attractive, however, the fact of the matter is that neither are there any disputed question of facts and nor can it be said that the purpose of justice will be sub-served by sustaining the orders of DRT and DRAT. On the contrary, we feel duty bound to exercise our powers under Article 226 and 227 in favour of the petitioner to remedy the injustice caused to the petitioner company by creating against it a liability by the respondent bank which was wholly uncalled for. Surely, it defies all logic, especially in view of the admitted clauses of the Agreement dated 7.3.1995 and letter dated 17.2.1995, that why should at all the petitioner company have taken loan in the form of an over draft in the current account when amounts in the form of fixed deposit were already available to the petitioner with the respondent bank for encashment of the refund orders.

12. In view of the above, we set aside the impugned judgments dated

19.11.2007 of the DRAT and dated 12.7.2004 of the DRT and thereby dismiss the original application/claim petition filed by the bank before the DRT and which was decreed in terms of the order dated 12.7.2004 of the DRT. The parties are left to bear their own costs.