
(2014) 09 AHC CK 0036
In the Allahabad High Court
Case No : Writ-C No. 34331 of 2006

Prakash Kanudia	Vs	APPELLANT
Chairperson, DRAT		RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 22(1)

Citation : (2015) 1 BC 85

Hon'ble Judges : Sunita Agarwal, J

Bench : Single Bench

Advocate : R.P. Agarwal, Advocates for the Appellant; U.S. Misra, Anjani Kumar Mishra, S.C. Siddharth and U.K. Mishra, Advocates for the Respondent

Judgement

Sunita Agarwal, J.—Heard Mr. R.P. Agarwal, learned Counsel for the petitioners Mr. Siddharth, learned Counsel for respondent Nos. 2 and 3 and learned Standing Counsel. By means of the present writ petition, the petitioners challenge the order dated 19.4.2005 passed by the Presiding Officer, Debts Recovery Tribunal, Allahabad (hereinafter referred to as DRT) as also the order dated 28.2.2000 passed by the Debts Recovery Appellate Tribunal, Allahabad (hereinafter referred to as DRAT).

2. By means of the orders impugned, the application filed by the petitioners to cross examine Mr. J.S. Kanwar and Mr. S.M. Pandey, Bank officials, who had sworn the affidavits filed in evidence has been rejected. The statutory appeal filed against the order of rejection was dismissed in limine.

3. An original application No. 27 of 2003 was filed by the Bank in March, 2003 under Section 19 of the Recovery of Debts Due to Bank and Financial Institution Act, 1993 (hereinafter referred to as RDBI Act) for recovery of certain amount from the principal borrower, petitioners and others as alleged guarantors. Petitioners are defendants in the said Original Application. Learned Counsel for the petitioner at the very outset submits that the original application is still pending before the

Debts Recovery Tribunal, Allahabad.

4. The facts relevant for deciding the controversy in hand are that along with the original application, two affidavits dated 25.2.2003 and 28.2.2003 of Mr. Sudhansu Mohan Pandey, officer of the Bank of India posted at Koregaon Park, Branch, Maharashtra and Mr. J.S. Kanwar posted as Chief Manager (Credit) Bank of India Zonal Office, Kanpur Nagar; respectively were filed. Petitioners filed their joint written statement on 7.1.2004. In support of the written statement, affidavit dated 7.1.2004 was filed by the petitioners. In the written statement, petitioners inter alia denied the execution of various guarantees and revival letters/acknowledgments relied upon by the Bank and sought to prove by filing the affidavits of aforementioned two officers. An application dated 14.1.2004 under Rule 12(6) of DRT (Procedure) Rules, 1993 (hereinafter referred to as the Rules) was moved by the petitioners. In the said applications, petitioners submitted that the averments made in the affidavits filed in evidence by the Bank officials were false and hence the petitioners/defendants be permitted to cross-examine them so as to prove falsity of the averments made by them in their affidavits. Application dated 14.1.2004 was rejected by DRT vide order dated 19.4.2005 on the ground that the affidavits were filed by the Bank officials to prove exhibits in support of the case of the applicant/Bank. The contesting defendants/petitioners may controvert the same by filing evidence, if any, in support of their defence of the case. It has been recorded that no material has been brought on record for which Bank officials could be put to cross-examination by the defendants/petitioners.

5. In the appeal, DRAT found that the application has been filed only with a plea that the affidavits of the Bank officials were false. The said averment in the application itself was not sufficient to cross-examine the witnesses of the Bank. It was further observed that in case, petitioners want to dispute or prove the falsity of the affidavits, they may file their evidence in rebuttal. Merely because the documents have been filed with the affidavits does not mean that the documents became admissible for all purpose. No grounds have been made out for satisfaction of the Tribunal to permit the cross examination and no infirmity has been found in the order of DRT, hence appeal was dismissed.

6. Assailing the orders passed by DRT and DRAT, learned Counsel for the petitioners submits that the application dated 14.1.2004 has been dismissed on irrelevant grounds. Learned Counsel for the petitioners has relied upon Rule 12(6) of the Rules which is quoted below:

"(6) The Tribunal may at any time for sufficient reason order that any particular fact or facts shall be proved by affidavit, or that the affidavit of any witness shall be read at the hearing, on such conditions as the Tribunal thinks reasonable:

Provided that after filing of the affidavits by the respective parties where it appears to the Tribunal that either the applicant or the defendant desires the production of a witness for cross examination and that such witness can be

produced and it is necessary to do so, the Tribunal shall for sufficient reasons to be recorded, order the witness to be present for cross-examination, and in the event of the witness not appearing for cross-examination, the affidavit shall not be taken into evidence and further that no oral evidence other than that given in this proviso will be permitted."

Placing reliance on proviso to Sub-rule (6) of Rule 12 of the Rules, learned Counsel for the petitioners submits that it was incumbent upon the Tribunal to accept the request of the petitioners after affidavits were exchanged by the parties. The petitioners denied their liabilities put forth in the claim made by the applicant Bank. They categorically denied the execution of guarantee deeds and acknowledgements etc. As the petitioners have disclosed their desire to cross-examine the witnesses to prove falsity of the affidavits filed by them, the Tribunal could not have rejected their request and could not have accepted the evidence in the form of affidavits in light of Rule 12(6) of the Rules.

7. He further submits that the Tribunal has failed to give sufficient reason for rejecting the prayer to cross-examine the Bank witnesses. There was no delay on the part of the petitioners in moving the application for cross-examination. The persons/officials who were to be cross-examined were available. While rejecting the application, specific averments made in the written statement filed by the petitioner were not considered. The averments of the written statement are part of the affidavit dated 7.1.2004 filed by the petitioners. Moreover in the application dated 14.1.2004, it was stated that the defendants have filed a joint written statement in reply to the application of the Bank and in the written statement, it was stated that the two affidavits filed in evidence were false. The said affidavit could not be taken on record and could not be read in evidence. The assertion of the written statements wherein specific averment has been made regarding falsity of the contents of the affidavits of the Bank Officials ought to have been considered by the Tribunal. The requirement of proviso to Rule 12(6) has not been adhered to in its true sense and the application has been summarily rejected.

8. He further submits that in view of Sub-rule (7) of Rule 12 of the Rules, the Tribunal has proceeded upon the affidavits of the applicants in support of their claim in the application and treated those documents in evidence as the petitioners have denied their liability to pay the claim made by the applicant. In view of Sub-rule (7) of Rule 12 of the Rules, the Tribunal will act upon the affidavits of the applicant and the petitioners would be deprived of an opportunity to rebut the evidence of applicant-Bank. Learned Counsel for the petitioners has further placed reliance on Section 22(1) of the RBD Act which reads as under:

"22. Procedure and Powers of the Tribunal and the Appellate Tribunal--(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act

and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings."

The submission is that the proceedings before the Tribunal and Appellate Tribunal are summary proceedings and proceed on the basis of affidavit in evidence. The strict procedure laid down in C.P.C. is not followed. However, as mandated in Section 22(1) of the Act, the Tribunal is under obligation to observe the principles of natural justice and in furtherance of the same, rules framed under the Act are to be followed. He submits that proviso to Rule 12(6) is only provision in the Rules by which the Tribunal is guided by the principles of natural justice and is the only stage before it to examine the witnesses and provide opportunity to the petitioner to prove that they had never executed the alleged guarantees indicated in the affidavit in evidence. Therefore, the Tribunals have committed serious error of law in rejecting the application for cross-examination. Reliance has been placed upon judgments of this Court in (2007) 139 Comp. Case (All) 144, S.P. Kanudia and Another v. Chairperson, Debts Recovery Appellate Tribunal and Others decided on 18.4.2007 and in Eiko Sales (Private) Limited and Another Vs. The Presiding Officer, Debt Recovery Tribunal and Another, . The relevant paragraph of Eiko Sales (Pvt.) Ltd. and Another (supra) is quoted below:

"A careful reading of the said rule would show that where it appears to the Tribunal that either the applicant or the defendant desires production of a witness for cross-examination and such a witness can be produced, an order cannot be made authorising the evidence of such witness to be given by way of an affidavit. In the case on hand the petitioner desired to cross-examine the witness, and in such circumstances the Tribunal could not have rejected the request of the petitioners and could not have accepted the evidence by way of affidavit in the list of Rule 12(6) of the Rules."

9. In Eiko Sales (Pvt.) Ltd. and Another (supra) Karnataka High Court placing reliance upon the judgment of Supreme Court, in case of Sudha Devi Vs. M.P. Narayanan and Others, , has held that the Tribunal could not have accepted the evidence in the light of Rule 12 read with a desire of the party to cross-examine the witnesses. The proviso to Sub-rule (6) of Rule 12 of the Rules imposes a bar upon the Tribunal from receiving such affidavits if a party desires to cross-examine the deponent.

10. In S.P. Kanudia and Another (supra) this Court has held that there was a specific denial by the petitioner that he did not sign the agreement of guarantee. Tribunal while interpreting the judgment of the Supreme Court in Union of India and Another Vs. Delhi High Court Bar Association and Others, has erred in law in concluding that cross-examination can be allowed only in "rare cases". The word "rarely arise" as used by the Supreme Court has been wrongly interpreted as "rare case". It was held by this Court that by confining the power to only in "rare cases", the Tribunal may defeat the right of a party to bring out the truth and to test the veracity of the witness. Where bona fide need for the oral examination of

a witnesses has been expressed and there is no desire to prolong the case, Tribunal has the power to allow cross-examination of the witnesses. It was found in the said case that the record does not substantiate that the defendants were trying to delay and avoid the liability and the personal guarantee, hence application filed by the petitioner in S.P. Kanudia case to cross-examine the Bank witnesses was held to be bona fide and filed with sufficient reason. The DRT was directed to summon the witnesses and to allow the Counsel for the defendants to cross-examine the witnesses.

11. Repelling the submission of the learned Counsel for the petitioner, Mr. Siddharth, learned Counsel for the respondent-Bank submits that the occasion for cross examination of the witnesses did not arise as the petitioners did not file any evidence in support of their case. After the written statement was filed, no documents have been filed in evidence. Mere statement in the application for cross examination that both the affidavits are false is not sufficient to invoke the power conferred in proviso to Sub-rule (6) of Rule 12 of the Rules. The written statement is only pleading and affidavit dated 7.1.2004 has filed in support of the pleadings. The said affidavit cannot be said to be an affidavit in evidence. On the basis of averments made in the written statement, the application for cross-examination could not have been allowed. In fact there was no evidence in rebuttal. Hence the Tribunal has not committed any illegality in rejecting the prayer for cross-examination of the Bank witnesses. The Tribunal found that sufficient reasons were not there to order the witnesses to be present for cross-examination. In case, the petitioners easier to rebut the averments made in the affidavit of the Bank witnesses, they ought to have filed their affidavits in evidence. He placed reliance upon proviso to Sub-rule (6) of Rule 12 of the Rules and submits that the said provisions would come into play only after affidavits of respective parties are filed. As this occasion did not arise, hence the Tribunals have rightly rejected the application on the ground that the petitioners may controvert the averments made in the affidavit by filing their evidence in support of their case.

12. Having considered the rival submission of the parties this Court finds that there cannot be any dispute with regard to position of law that DRT in a given case where an application is moved for production of the witnesses for cross-examination, shall allow the said prayer. The Tribunal has to look into the fact as to whether desire of the witnesses to cross-examine is bona fide or not. Where there is no effort by the defendant to prolong the case, it shall require the witnesses to be present for cross-examination and in the event of his non-appearance, the affidavit cannot taken in evidence. There should be no reason as to why Tribunal may not call upon the witnesses for cross examination. If it, appears to it that there was good reason to make the prayer.

13. Careful reading of Rule 12(6) of the Rules further indicates that though acceptance of the affidavits of the witness has been permitted in Sub-rule (6) of Rule 12 of the Rules. However proviso to said rule imposes a bar on the Tribunal

from receiving such affidavits, if a party desires to cross-examine the deponent. The Tribunal could not have accepted the evidence in the light of Rule 12 read with a desire of the party to cross-examine the witnesses.

14. In the light of above provisions, though it is found that the petitioners did not file their evidence in support of their case, however, it is found that the application to cross-examine the witnesses has been filed at the very first opportunity along with the written statement. It appears that the petitioners were under impression that the averment made by them in the written statements would be sufficient. It is further found that Section 22(1) of the Act clearly mandates that principles of natural justice are to be followed by the Tribunal. As there was no delay by the petitioners and no effort has been made to prolong the matter, hence this Court finds that in order to sub-serve the principles of natural justice and in view of provisions of Sub-rule (6) of Rule 7 of the Rules, an opportunity be provided to the petitioners to file their affidavits in defence. Learned Counsel for the parties informed that 22.9.2014 is the next date fixed before the Tribunal and the matter is being preceded for final hearing. Accordingly, the petitioners are directed to file their evidence in the form of affidavits before the Tribunal on the next date i.e. 22.9.2014. Along with their affidavits they may file fresh application under Rule 12(6) of the Rules with the specific assertion to cross-examine the witnesses stating therein the ground and reason as to why they want to cross-examine the Bank witnesses. If such an application is moved within the time allowed by this Court, the Tribunal shall decide the same on its merit in the light of the provisions as discussed above and pass a reasoned and speaking order in accordance with law. Further it goes without saying that the Tribunal shall not be guided by its earlier order rejecting the application dated 14.1.2004 under Rules 12(6) of the Rules.

With these observations the writ petition is disposed of.