

(2012) 01 DEL CK 0282

In the Delhi High Court

Case No : Writ Petition (C) No. 6729 of 2010

Raj Kumar Agarwal

APPELLANT

Vs

State Bank of Patiala and Others

RESPONDENT

Date of Decision : 12-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0282

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : K. Kumar, for the Appellant; Irfan Ahmed, Advocate for R-1, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

WP (C) No.6729/2010

1. Rule DB.

2. Learned counsel for respondent No.1 accepts notice.

3. At request of learned counsels for the parties, the petition is taken up for final disposal.

4. The failure of the borrowers and guarantor to repay the amount resulted in a suit being filed by respondent No.1-Bank against respondents 2 & 3 and the predecessor-in-interest of the appellant, Late Shri Naresh Kumar Aggarwal, (the father). The father of the appellant was a guarantor while respondent No.3 is the sole proprietor of respondent No.2, the borrower.

5. The defendants in the suit failed to enter appearance resulting in them being proceeded ex parte vide order dated 2.2.1995. However, before Suit No.2061/1993 could be decided, the Recovery of Debt due to Banks and Financial Institutions Act, 1993, came into force and consequently the proceedings were transferred to the Debt Recovery Tribunal. The OA

No.191/1995 (registered after transfer to the DRT) was decreed on 11.3.1997. The one page order only records that ex parte evidence by an affidavit of the Manager of the Bank has been filed and since no cause is shown by the defendants there was nothing to disbelieve the statement of the witness. The defendants were directed to pay a sum of Rs. 35,54,814.27 together with pendente lite and future interest @ 23.75 per cent per annum from the date of institution of the suit till the final realization of the entire amount. In the event of failure to pay the amount, respondent No.1-Bank was entitled to recover the amount by sale of the mortgaged property of the guarantor.

6. If one may say so, there is no discussion whatsoever on the merits of the claim and for convenience of reference, we reproduce the whole order as under:

Originally the suit was filed in the High Court on 14.9.93. on coming into force the Recovery of Debt due to Banks and Financial Institutions Act, 1993, the case was transferred by the High Court to the Tribunal. The defendants were proceeded ex parte on 2.2.95. The defendants did not appear nor have they filed WS. Thus, there is no cause shown by the defendants. The applicant bank in support of their case filed the ex parte evidence an affidavit of Shri Pradeep Gupta, Manager of the applicant bank. Since there is a cause shown by the defendants, there is nothing before to disbelieve the statement of the witness. Thus, the case of the applicant is proved.

The defendants are ordered to pay a sum of Rs. 35,54,814.27 together with pendente lite and future interest at the rate of 23.75% p.a. from the date of institution of the suit till the final realization of the entire amount. The defendants shall be jointly and severally liable to pay the amount within four weeks.

In the event of failure to pay the said amount within the stipulated period, the applicant bank shall be entitled to recover the amount by the sale of the mortgaged property comprising property built at plot No.30-31, House No.5609-5615, Basti Harphool Singh, Sadar Bazar, Delhi.

Even if by sale of the mortgaged property the entire amount is not recovered, the balance amount shall be recovered from the defendants jointly and severally.

Certificate be issued accordingly.

Announced in open Court.

7. Shri Naresh Kumar Aggarwal, the guarantor, filed an appeal against that order which was registered as Appeal No.218/2000 before the DRAT but during the pendency of the appeal he passed away. His legal heirs were, thus, brought on record including the appellant, his son. The prayers made in the appeal were as under:

6. RELIEF SOUGHT

a. The order dated 11.03.1997 passed by the Debt Recovery Tribunal, Delhi may

please be ordered to be set aside on the grounds stated in Para No.5 of the grounds of appeal.

b. The suit may please be ordered to be dismissed against the appellant as he is not connected with the matter in any way.

c. In the alternative, after the setting aside the orders dated 11.03.1997, the appellant be given an opportunity to defend the case on merits and

d. That the suit be ordered to be dismissed on the ground that no LR of the deceased respondent No.3 has been brought on record and the suit, therefore, stands abated against the appellant and respondent Nos.2 to 5 including the deceased respondent Nos.3 and 5.

e. Costs of appeal and suit be also ordered to be awarded to the appellant.

8. The aforesaid reliefs prayed for have been reproduced to show that there was no prayer made for setting aside of the ex parte proceedings. Shri Naresh Kumar Aggarwal had filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908, before the DRT but that application was dismissed vide order dated 18.1.1999. That order along with ex parte decree dated 11.3.1997 was assailed before this Court by filing a writ petition under Article 226 of the Constitution of India, being WP (C) No.2181/1999. During the pendency of that petition, on directions of the High Court, the appellant deposited a total sum of Rs. 10.00 lakh in two installments. The writ petition was disposed of on 15.2.2000 directing Shri Naresh Kumar Aggarwal to file the appeal within 30 days of the order. Thus, the ex parte decree passed by the DRT was sought to be examined on merits.

9. The appeal has been dismissed vide impugned order dated 14.9.2010, which is assailed before us by filing the present writ petition under Article 226 of the Constitution of India. As to the scope of examination by the DRAT, the first paragraph itself is significant which reads as under:

1. The only question involved in this appeal is whether the ex parte order rendered by the lower court can stand the scrutiny of law.

10. A perusal of the order shows that the DRAT has examined whether late Shri Naresh Kumar Aggarwal was rightly or wrongly proceeded ex parte. Towards the said objective the reports of the process servers and the orders passed have been perused. The plea that no transfer notice was sent to the defendants on the case being transferred to the DRT has also been examined and rejected since the party was already proceeded ex parte. The other plea examined is arising from the death of other defendants whose legal heirs were not brought on record. There is, however, no examination of the controversy whatsoever on merits.

11. In the course of the hearing on 21.3.2011 what was sought to be urged by the counsel for the petitioner was that the appeal before the DRAT on merits against the ex parte decree was not examined. We noted that an endeavour was

made to settle the matter by submitting proposals by the petitioner to respondent No.1-Bank and payments deposited in the interregnum period from time to time. The subsequent order sheet dated 26.5.2011 shows that the petitioner had deposited a sum of Rs. 30.00 lakh with respondent No.1-Bank and gave an offer of Rs. 55.00 lakh. This offer was recommended by the Branch but the Head Office turned down even this offer.

12. Learned counsel for the petitioner before us submits that neither the DRT nor the DRAT have examined the merits of the claim of respondent No.1-Bank and the only controversy he seeks to urge is the rate of interest which is not established as per the documents placed on record by respondent No.1-Bank. He further states that till date the petitioner has paid about Rs. 55.00 lakh, which is not disputed by learned counsel for respondent No.1-Bank. Thus, it appears that while stating that the amount of Rs. 30.00 lakh was paid up to 26.5.2011, the counsel for the petitioner did not give the total amount deposited even till that date which was more.

13. We are of the considered view that the controversy, at least, qua rate of interest must be examined by the DRAT. We say so as the decree passed by the DRT does not deal either with the merits of the claim established by respondent No.1-Bank or as to how the rate of interest has been awarded. It is really a non-speaking decree. The DRAT has also not gone into the merits of the controversy and has only discussed the issue of the ex parte proceedings initiated against the defendants apart from the plea of the non-impleadment of all legal heirs. At least some forum is required to look into the documents and examine as to how the rate of interest is established as per those documents and also to consider the plea of the appellants of reduced pendente lite and future interest especially in view of the deposits made by the appellant.

14. The impugned order dated 14.9.2010 of the DRAT is accordingly set aside and the matter is remanded back to the DRAT for examination limited to the aforesaid aspect.

15. The writ petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

16. The petitioner and respondent No.1-Bank to appear before the DRAT on 6.2.2012.

17. A copy of the order be sent to the DRAT without process fee.

CM No.13314/2010

18. In view of the disposal of the writ petition, no further directions are called for on this application and the same stands disposed of.