(2011) 02 DEL CK 0003

In the Delhi High Court

Case No : Writ Petition (C) No. 956 of 2011

Smt. Maya Rani APPELLANT

Vs

Oriental Bank of Commerce and Others RESPONDENT

Date of Decision : 14-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2011) 02 DEL CK 0003

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

Bench : Division Bench

Advocate : Rajeeve Mehra and Arvind Sharma, for the Appellant; H.C. Kundra, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

CM Appl. No. 1997/2011

Allowed subject to all just exceptions.

WP (C) No. 956/2011

1. M/s. Mod Enterprises was a partnership firm constituted by one Mr. Sudhir Kumar Sharma, Respondent No. 3 herein and Smt. Maya Rani, the Petitioner herein. The partnership firm with the partners signing availed of loan facilities from Respondent No. 1 Bank - packing credit loan facility of Rs. 5 lakhs and FDBP loan facility in the sum of Rs. 8 lakhs. The documents in this behalf were executed in the prescribed form, which are not in dispute.

2. It is the case of Respondent No. 1 Bank that the firm failed to submit the export documents after shipment of goods to liquidate the pre-shipment advance. The payment was also not made. Similarly, the terms and conditions of packing credit facilities were also not adhered to.

3. The important aspect is that there was a change in constitution of the firm in pursuance whereto Respondent No. 2 herein being the firm was dissolved and was taken over by Respondent No. 3 herein as its sole proprietor. In pursuance thereto, fresh loan documents were executed. It is, however, alleged that the other Respondents herein and the Petitioner agreed to continue as guarantors. We may notice that one of the persons, who is alleged to be the guarantor, was the husband of the Petitioner, but during the proceedings for recovery, the name of the husband of the Petitioner was deleted from the array of parties as there was nothing placed on record to show that he had guaranteed the principal debt. It has also been stated that the Petitioner herein (original Defendant No. 3) became a guarantor in respect of the loaning facilities granted by the Bank.

4. The default resulted in filing of civil suit on the Original Side of this Court with the plaint signed and verified on 29.10.1990. The suit was, however, transferred to Debt Recovery Tribunal (for short, "DRT") on constitution of the Tribunal.

5. The allegation in the plaint, which is material for examining the controversy, was noticed in para 13 of the impugned order and reads as under:

The plaintiff states and submits that the Defendants have from time to time confirmed, admitted and / or acknowledged their liability towards the plaintiff in terms of the balance confirmations dated December 30, 1985, June 30, 1986, December 23, 1987 signed and executed by Defendant No. 2 and the balance confirmation dated November 21, 1987 signed and executed by Defendant No. 4. The Defendant No. 3 also admitted her liability both as Partners and Guarantor in terms of her letters dated August 13, 1986.

(emphasis supplied)

6. The defence taken by the Petitioner herein as Defendant No. 3 in respect of that para is also reproduced below:

Para 13 to the extent it deals with the alleged letter dated 13.08.1986 of the answering Defendant is a matter of record; rest of the contents are totally false, frivolous and hence denied. It is denied that the answering Defendant admitted or acknowledged any liability in terms of alleged balance confirmation dated 30.12.1985, 30.06.1986 and 23.12.1987. The alleged balance confirmation signed and executed by Defendant No. 2 cannot bind the answering Defendant as the Defendant No. 2 had no authority of the answering No. 3 to acknowledge and confirm any liability on her behalf. Similarly, the alleged balance confirmation dated 21.11.1987 signed and executed by Defendant No. 3 does not bind the answering Defendant at all.

(emphasis supplied)

7. The result of the aforesaid pleadings is that neither the existence nor the genuineness of the letter dated 13.08.1986 was put in issue. The denial in the written statement was blissfully vague to say the least. This document is the fulcrum of the case of Respondent No. 1 Bank against the Petitioner and is

reproduced hereunder:

Ref. No. ....

Dated: 13.8.86

The Senior Manager,

Oriental Bank of Commerce,

78, Guru Amar Dass Bhawan,

Nehru Place, New Delhi.

Reg.: M/s. Mod Enterprises.

Dear Sir,

As you are aware that the firm M/s. Mod Enterprises has since dissolved w.e.f. 3.7.86 and Sh. S.K. Sharma has taken all the assets & liabilities of the firm. A written dissolution deed to the said effect was also executed on 3.7.86 and a copy of the same was also submitted to you. Though the firm has been dissolved and I have got no concern whatsoever, except for the liability which stood on the date of dissolution of the firm. I undertake to pay the overdue amount in the Packing Credit Limit granted to M/s. Mod Enterprises and I shall act as a Guarantor till the entire outstanding amount is paid off/cleared.

You are requested to plea treat the firm as a Dissolved one and with a view to secure the outstanding amount in the account of M/s. Mod Enterprises, I may be treated as a guarantor on the strength of this letter.

Thanking you.

Yours faithfully,

sd/-

(Maya Rani)

(emphasis supplied)

8. It is at the stage of filing of written submissions that the Petitioner sought to raise various pleas in the context of the aforesaid letter before the Presiding Officer of the DRT. In sum and substance, the pleas are four-fold:

(i) The document, which purports to be on a letterhead, is actually a photocopy of the letterhead with the signatures being also photocopied, though the typed material is in original. The plea, thus, is that either there was blank letterhead of the firm though signed, of which photocopy is taken and the material typed on; or in the alternative, the photocopy of a blank letterhead is taken, typed upon and then the signatures lifted from some other document and photocopied/ placed on the said document. Thus, the authenticity of this document is sought to be disputed;

(ii) The document dated 13.08.1986, if it so exists, can at best be an agreement to execute guarantee and not a guarantee itself;

(iii) The plea of non-stamping of this document as a guarantee document; and (iv) The plea of limitation since this document was executed on 13.08.1986 and there is no subsequent document executed by the Petitioner.

9. The DRT, however, found against the Petitioner in terms of the order dated 20.10.2005. It did notice the pleas made in defence, but the same were rejected. The original document was perused. The plea that signatures of the Petitioner were a photocopy was rejected. The plea of limitation was also dealt with. The DRT came to the conclusion that since the debt had been acknowledged by the sole proprietor (Respondent No. 3 herein), the same would extend the liability of the Petitioner as a guarantor. Insofar as the plea of the document being unstamped was concerned, the DRT held that it did not discharge the liability of the Petitioner herein. We note that the plea that the document dated 13.08.1986 is only an agreement to execute the guarantee has not been dealt with; possibly for the reason, it was never advanced. Assuming for a moment, such a plea was advanced, a review would ordinarily have been filed. Admittedly, no review was filed to correct the record.

10. The Petitioner aggrieved by this order preferred an appeal before the Debt Recovery Appellate Tribunal (for short, "DRAT"). Learned senior counsel for the Petitioner points out that at the stage of admission of the appeal, the then Presiding Officer granted exemption for pre-deposit for the whole amount in terms of the Order dated 09.11.2006. The appeal has, however, been ultimately dismissed by the impugned order dated 18.11.2010, which is now sought to be assailed by the Petitioner under Article 226 and 227 of the Constitution of India (for short, "the Constitution").

11. We have heard learned Counsel for the parties at length and perused the record filed with the present writ petition running into seven volumes with the assistance of learned Counsel for the parties.

12. We may note at the inception itself that this Court does not sit as a court of second appeal, but if some manifest injustice is found to have occurred or the conscience of the Court is pricked, this Court is not devoid of the jurisdiction to interfere in those proceedings.

13. Learned senior counsel for the Petitioner before us also made submissions in respect of the aforesaid four pleas recorded by us. Learned senior counsel strenuously contended that the authenticity of the document dated 13.08.1986 is in doubt and this Court should call for the original record to peruse the document.

14. We are, however, not persuaded to accept the plea of learned senior counsel for the Petitioner because the Petitioner cannot improve its case beyond what it had set out in the written statement. We have extracted the averments made in the plaint as well as the written statement for the said purpose, which are also

extracted in the impugned judgment and have weighed with the DRAT. It was never the case of the Petitioner that the document dated 13.08.1986 was not executed by the Petitioner. What was sought to be denied was the liability arising from the document because the acknowledgement of debt was not signed by the Petitioner. The DRT as well as the DRAT have categorically stated that they have perused the document and satisfied themselves about the genuineness of the same. In this behalf, we would only extract para 12 of the impugned order, which reads as under:

12. I have gone through these authorities. These hardly dovetail with the facts of the present case. The crucial and important document upon which the entire case rests is the letter dated 13.08.1986 written by the Appellant to the Bank. I have perused the said document. This document is on the letterhead of M/s. Mod Enterprises. It does not appear to be a photostat copy. It appears to be the original letterhead of M/s. Mod Enterprises. The explanation given by the Appellant that the signature appearing on the said letter is the photostat of the original signature of Smt. Maya Rani, which was obtained from some other document, is difficult to fathom. I have perused the said document from all the sides. There appears to be no such inkling. The veracity of the document is not in doubt.

(emphasis supplied)

15. In view of the concurrent findings of two courts below and the own stand of the Petitioner in her written statement, the authenticity of that document cannot be doubted. Once the veracity of the document is not in doubt, the guarantor"s liability would continue to obtain, ordinarily, alongside the principal debtor, i.e., would be "co-extensive" with that of the principal debtor. The extension of limitation by the principal debtor would bind the guarantor. We would revert to this aspect.

16. Insofar as the second plea of the document being only an agreement to execute the guarantee is concerned, the same finds no discussion even in the impugned judgment of the DRAT. We have also noticed that this plea was not even recorded by the DRT and, thus, seems to have been either given up or abandoned during the course of arguments since no review was filed. We do not propose to allow the writ Petitioner to raise such a plea before us in writ jurisdiction without attempting to correct the record of the authorities below. Be that as it may, we may also note that the document dated 13.08.1986 would have to be read in its entirety and understood in the context in which the document was executed.

17. The status of the Petitioner was different from the other guarantors. The reason was that the Petitioner was a principal borrower though her plea is that she was only a sleeping partner since her husband was a government servant. Even if the partnership was dissolved, her liability outstanding as on that date would not have been extinguished unless the amounts due on that date were

cleared and the proprietorship concern of Respondent No. 3 commenced business afresh. Thus, the letter dated 13.08.1986, if it is read in its proper perspective, it only acknowledges this status of the Petitioner, which is that she would be liable for the debts of the partnership firm as obtaining on the date it got reconstituted into a proprietorship concern. The Petitioner in order to enable her to move out of the partnership firm agreed to guarantee the amount, which stood due against her.

18. We may notice that the issue of stamping of the document in question has again not been dealt with by the DRAT nor has the Petitioner gone back to the DRAT by filing any review application alleging that any plea advanced has been left untouched. In any case, in view of the nature of the document discussed above, this plea would not be available. We may also take into account the observations made by the Supreme Court in Javer Chand and Ors. v. Pukhraj Surana AIR 1961 SC 1625 that a court has to judicially determine the matter as soon as the document is tendered in evidence before it is marked as an exhibit. Once a document has been marked as an exhibit in the case and has been used by the parties during the process of examination and cross-examination, an unstamped document is not liable to be rejected. We are, of course, conscious of the fact that in the proceedings before the DRT, no such cross-examination is available as a matter of right, but then the objection should have been raised at the stage when the document was exhibited. This aspect attains greater significance when seen in the light of pleas or rather the absence of plea in the written statement qua the status of the letter dated 13.08.1986.

19. Insofar as the plea of limitation is concerned, in the aforesaid circumstances, learned senior counsel for the Petitioner cannot dispute that if the authenticity of the letter dated 13.08.1986 is not doubted, then the acknowledgement debt by the principal borrower, i.e., Respondent No. 3 herein would equally bind the Petitioner. We also note that the Petitioner had executed a letter of continuity at the time when the original documents were executed while availing of the loan facility.

20. The matter has, in fact, dragged on for two decades though the bank must have been making an endeavour to recover the dues from the principal debtor. Apparently, this exercise has not borne fruit. These observations are based on the fact that proceedings initiated by the Recovery Officer continued during the pendency of the appeal instituted by the Petitioner.

21. We find no reason to interfere under Article 226 and 227 of the Constitution. We were inclined to impose exemplary costs, but for the fact that the Petitioner is a lady, who has recently lost her husband.

22. Dismissed.

CM Appl. No. 1996/2011

Dismissed.