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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 02.05.2011

Judgment delivered on: 10.05.2011

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WP(C) No. 8061/2010

M/S PRESTOLITE OF INDIA LTD. & ORS.

..... PETITIONERS

Vs

UNION BANK OF INDIA & ANR

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioners : Mr Rajeev Mehra, Sr. Adv. with Mr Sumeher Bajaj, Advocate.
For the Respondents : Mr S.W. Haider, Advocate for Respondent No. 1.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | No |
| 2. | To be referred to Reporters or not ? | No |
| 3. | Whether the judgment should be reported in the Digest ? | No |

RAJIV SHAKDHER, J

1. The present writ petition has been filed against a common order dated 04.08.2010 passed by the Debt Recovery Appellate Tribunal (hereinafter referred to as 'Tribunal') in appeal nos. 86/2007 and 204/2007. Appeal No. 204/2007 has been filed by the Judgment Debtors (in short 'JDs') while appeal no. 86/2007 has been filed by the Union Bank of India, the judgment creditor in the present case.

2. This is a second round before the Tribunal. We are, however, constrained to note that the disposal of the appeal has not been satisfactory. There are several aspects which the Tribunal has failed to elucidate upon. Findings have been returned without reference to the relevant documents. Before we elaborate upon same, we would like to note briefly the relevant facts which gave rise to the present proceedings. The writ petitioners before us, i.e., JDs have in their writ petition adverted to several events, which, according to us

became irrelevant after the particular point in time in view of the fact that admittedly, at some point in time, a consent decree was drawn up between the parties. The writ petition is prolix and replete with facts and circumstances obtaining prior to the passing of the consent decree as between the parties, therefore, what is relevant to appreciate the controversy in issue is delineated hereinbelow by us.

3. The petitioner/JDs had obtained financial assistance from the respondent no. 1/bank (hereinafter referred to as 'bank'). There was, according to the bank, a default in paying the overdue amount which, propelled it to file a suit against the petitioners including respondent no. 2, who evidently since then has been deleted from the array of parties vide order dated 01.12.2010. The bank filed the suit on and around 18.06.1981 in the court of Additional Senior Sub-Judge, Faridabad (hereinafter referred to as the Faridabad Court). The said suit was registered as Civil Suit No. 350/1981. In the said suit, the bank sought recovery of a sum of Rs 2,27,58,343.70 alongwith interest. It is not in dispute that on the date of institution of the said suit, goods worth approximately Rs 35 lacs were stored in the factory premises of the writ petitioners which were pledged to the bank. Besides these goods, the bank had also recalled certain goods which were lying with the transporters of the petitioners. The value of these goods, which is once again not in dispute, was a sum of Rs 26,53,392.98. These goods, pursuant to the orders of the Faridabad Court, were recalled and put in a godown taken on rent by the bank. It is important to note that these goods came to be retrieved at the say so of the bank who had approached the court for appointment of a local commissioner and a receiver. It is the case of the petitioners that the said goods were packed in 3000 wooden boxes and were supported by a voluminous set of documents numbering approximately 1058 pages.

3.1 At this point it may be noted that the writ petitioners challenged the appointment of the receiver by the Faridabad court by way of a revision petition. The High Court of Punjab & Haryana vide order dated 26.09.1985 allowed the revision petition and set aside the order appointing the receiver.

3.2 There is another facet of the matter to which our attention was drawn. This was a suit filed by the bank in this court being suit no. 565/1974 both against petitioner no. 1 and one of its dealers, i.e., Swastika Motors. The said suit was decreed in favour of the bank vide judgment dated 06.07.1982. The judgment of the Punjab & Haryana High Court is reported in AIR 1986 P&H 64. The said suit came to be filed by the bank on the ground that it had provided commercial credit to petitioner no. 1 by way of a bill discounting facility by purchasing hundis drawn by petitioner no. 1 and the said dealer, i.e., Swastika Motors. This suit was decreed in favour of the bank for the sum of Rs 4,21,103.68 along with pendente lite and future interest at the rate of 12% per annum. The judgment of the learned Single Judge of this court has been reported in AIR 1983 Del. 240. We are informed the said judgment has been attained finality.

3.3. Evidently, against the judgment of Punjab & Haryana High Court a Special Leave Petition (in short 'SLP') was preferred by the bank. It appears that given the protracted litigation between the parties, the parties chose to come to an agreement. The consent terms were drawn between them which were recorded in an agreement dated 15.11.1991. A decree was passed by the Faridabad court in terms of the said consent decree. In terms of the consent decree, the petitioners agreed to a joint and several liability in respect of payment of monies to the bank, which was crystallized at Rs 1,12,00,000/- together with simple interest at the rate of 13.5% per annum. What is important is that, in so far as the interest was concerned, it was to accrue 30 months after the date of the consent decree till payment or realization in full and final settlement of the bank's claim in the suit.

3.4. The mode and manner of payment of the amount crystallized in the consent decree is provided in clauses 1, 2 and 3 of the said agreement. The consequences of default are contained in clauses 4 and 7. There were, apart from the above, a set of obligations which the parties had undertaken. These obligations, on which much argument was heard both by us and evidently by the authorities below, are contained essentially in clauses 5 [in particular clause 5(b) and 5(c)] , 6, 9 and 14 of the said

consent agreement. For the sake of convenience the said clauses are extracted hereinbelow:

“5. Agreed, declared and ordered that repayment of the decretal claim mentioned in clause 1 above is hereby validly created to secure in favour of the plaintiffs.

(a) by charge upon the entire fixed and floating assets of defendant no. 1 namely all the properties and land and building of the factory premises of defendant no. 1 admeasuring 7 bighas 5 bighas comprising of Khasra Nos. 302, 303 and 304 situated at 16/4, Main Mathura Road, Faridabad (Haryana) more particularly described in Schedule 1 hereto below together with plant, machinery, equipments etc. herein.

(b) By pledge of the Stock of defendant no. 1 in possession of the plaintiff as per the statement of stocks annexed hereto as schedule no. 2 for securing repayment to the extent of Rs 35,39,524.58. Out of the said amount the defendant o. 1 has deposited an amount of Rs 7,49,720.00 till date.

(c) By pledge of the stock (covered under bills recalled) of defendant no. 1 in possession of the plaintiff as per the statement of stock annexed hereto as schedule no. 3 and securing repayment to the extent of Rs 26,53,392.98.

6. The plaintiff agrees to release the pledged goods mentioned in clause 5(b) and (c) above us and when required by the 1st defendant against payment by the 1st defendant to the plaintiffs of the amount equivalent to advance value thereof as mentioned in schedule No. 2 and 3 hereto. The plaintiff agrees to appropriate such payments received for the 1st defendant or to the (illegible) towards the amount of instalments payable by the defendants no. 1 to 3 as per clause 2 above.

Only on payment of the full decretal amount with interest as stated above the plaintiff agrees to release all the securities mentioned herein above in clause 5(a), (b), (c) and to release the personal guarantees executed by the Directors.

9. The plaintiff agrees to grant its ‘No Objection Certificate’ in favour of the 1st defendant immediate within two days of passing of the consent decree with a view to enabling the 1st defendant to avail loans and/or banking facility from other banks and financial institutions.

14. The defendant no 1 to 3 undertake to this Hon'ble Court to insure to the satisfaction of the plaintiff and keep insured all the properties moveable and immovable constituting the plaintiff's securities hereunder against fire and all other risks in a sum equivalent to their full market value with insurance company approved the plaintiff in the joint names of the plaintiff may require and shall duly and punctually pay all premium and shall not do or suffer to be done by anything which may invalidate or avoid such insurance and shall deposit the INSURANCE policy and all over notes premium receipts and other documents connected therewith the plaintiff. Any monies released from such insurance shall at the option of the plaintiff be applied either in reinstating the security or in payment of the loan advanced and interest."

4. Before we come back to what was argued based on the clauses extracted hereinabove, for the sake of completion of the narrative, we would like to advert to the following aspects.

4.1 It appears that the No Objection Certificate (in short 'NOC') which the bank was required to issue in favour of the petitioners in terms of clause 9, was issued only on 30.01.1993. It is another matter, which is the bank's stand, that the petitioners sought the issuance of the NOC only on 24.01.1993. The petitioners, however, have taken a contrary stand. It is their stand that in the interregnum, i.e., between 28.11.1991 and 1993 they, dispatched several communications to the bank calling upon them to perform their obligations under the consent decree. In this context our attention was drawn to letters dated 28.11.1991, 23.01.1993, 15.07.1993 and 16.11.1993.

4.2 Furthermore, on 30.06.1995, the petitioners moved an application under Section 47 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') for execution of the consent decree to the extent it was passed in their favour. The said application was followed by two more applications. The said two applications were filed on the same date, i.e., 22.08.1996. These applications were filed under the provisions of Order 1 Rule 10 and Order 6 Rule 15 read with Section 151 of the CPC for grant of compensation as well as for striking out the name of Sujit Singh Sahni (petitioner

no. 2) from the array of parties. The other application of even date was filed under Section 47 of the CPC for claiming damages suffered by the appellants broadly on the ground of the bank's failure to perform its obligations under the consent decree which included the issuance of a NOC.

4.3 In the meanwhile since the Parliament had enacted the Recovery of Debt due to Banks & Financial Institutions Act, 1993 (in short 'RDB Act'), which was brought into force from 24.06.1993, the bank filed an application with the Debt Recovery Tribunal (in short 'DRT') at Jaipur for transfer of the proceedings pending in the Faridabad court, and for issuance of a recovery certificate in terms of the RDB Act. These proceedings, on the constitution of the DRT, Chandigarh, were transferred from the DRT at Jaipur to the DRT at Chandigarh. On 27.07.2002 the writ petitioners filed an application under Section 31 of the RDB Act for transfer of its execution petition being application No.26/X/10 dated 12.06.1995 from the Faridabad court to the court at Chandigarh. By an order dated 04.01.2003, the Faridabad court transferred the said execution application to the DRT at Chandigarh. However, by a subsequent order dated 20.07.2004, which was virtually a consent order, the said application was transferred back to the Faridabad court on the ground that only that court would have the jurisdiction to deal with the said execution petition.

4.4 In the meanwhile, on completion of pleadings in the initial application filed by the bank on 03.11.1998 for issuance of a recovery certificate, the DRT proceeded to pass an order dated 14.01.2005 issuing a recovery certificate in favour of the bank. By virtue of the said recovery certificate the petitioners were directed to pay a sum of Rs 1,89,07,513/- along with pendente lite and future interest as awarded by the Faridabad court pursuant to the consent decree drawn up between the parties.

4.5 The writ petitioner carried the matter in appeal to the Tribunal. The appeal was registered as appeal no. 50/2005. The Tribunal by order dated 15.09.2005 remanded the matter to the DRT as the objections of the parties had not apparently been dealt with by the DRT according to the Tribunal. Consequently, the recovery certificate issued by the

DRT on 14.01.2005 was cancelled. The DRT was directed to consider the objections of petitioners.

4.6. As noticed above, it is in the second round that the DRT passed its judgment dated 04.04.2007. In this round the DRT has issued a recovery certificate in favour of the bank amounting to Rs 99,147,951.19/- along with the pendente lite and future interest at the rate of 12% per annum compounded quarterly from the date of filing of the application till its realization. Importantly, the DRT while passing the said order declined to grant interest to the bank for the period commencing from 15.11.1991 till 31.11.1998. Against the said judgment of the DRT, as mentioned above, cross appeals were preferred by both parties. The Tribunal by the impugned judgment dated 04.08.2010 has disposed of both the appeals. It is against the order of the Tribunal dated 04.08.2010, the present writ petition has been filed by the JDs, being the petitioners before us. The bank has not assailed the judgment of the DRT.

5. Before us arguments on behalf of the petitioners were advanced by Mr Rajiv Mehra, senior advocate assisted by Mr Sumehar Bajaj, Advocate whereas, on behalf of the bank arguments were advanced by Mr Haider.

5.1. Briefly, Mr Mehra's submissions centered around the breach of obligations by the bank as envisaged in the consent decree. It was Mr Mehra's submission that it was on account of the bank not fulfilling its obligation, that the petitioners were unable to fulfill their part of the obligations which was to pay the amount crystallized in the said consent decree. The breach of obligations by the bank, to which reference was made by Mr Mehra, focused on four aspects. These being: (i) non-grant of NOC by the bank within the stipulated period of 48 hours as envisaged in clause 9 of the consent decree; (ii) the failure on the part of the bank to release the goods from time to time even though payments had been released by the petitioners as envisaged in clauses 5(b) and (c) read with clause 6 of the agreement; (iii) the failure of the bank in taking out insurance in respect of goods referred to in clause 5 which were, according to him, in the power and possession of the bank; and (iv) lastly, the Tribunal's observations that the petitioners

were not entitled to set off/counter claim on account of the fact that an application with respect to the same was pending adjudication in the Faridabad Court.

5.2. Mr Haider who appeared for the bank briefly submitted that in so far as the issue of grant of NOC is concerned the same was admittedly issued on 30.01.1993; a fact which we have already noticed hereinabove. Mr Haider submitted that the observations of the DRT in regard to the NOC (contained in paragraph 24 and 25 of the judgment) to the effect that it was a useless piece of document, would not itself lead to a situation that the bank was not entitled to the payments, as envisaged in the consent decree. In any event, according to Mr Haider, these findings of the Tribunal were unjustified. Mr Haider further argued that time had ceased to be of essence since the petitioners sought the NOC for the first time only on 24.01.1993; a fact which is noticed by the DRT in its judgment. In so far as the pledged goods were concerned it was Mr Haider's contention that they related to goods which were available in two lots. The first lot, which is subject matter of clause 5(b) of the consent terms and was valued at Rs 35,39,524/-, was kept in a godown situated in the factory premises of the petitioner though under the lock and key of the bank. The second lot, which is the subject matter of clause 5(C) of the consent terms, were goods which were recalled from the transporters and were valued at Rs 26,53,392/-. These goods were kept in a godown taken on rent by the bank itself. As regards the first lot of goods Mr Haider drew our attention to the following averments made in paragraph 3 at page 90 of the writ petition:

“The entire stock, though intact regarding quantity as borne out by the report of the local commissioner appointed by DRAT, owing to the wanton acts of negligence and omissions and commissions of the respondent bank have now been reduced to a heap of scrap of no value as all the models of the cars then in vogue have become obsolete and are out of market.”

5.3. Relying on the aforesaid averment it was contended by Mr Haider that in respect of the said goods the Tribunal has rightly not granted any relief to the petitioners as at no point in time was the bank ever called upon to release the said goods so that the sale proceeds obtained thereof, could be adjusted against the loan. As regards the second lot

of goods [i.e., clause 5 (c) of the consent terms] Mr Haider submitted that the Tribunal has attributed a part of the negligence to the bank and directed consequently an adjustment of Rs 12 lacs. Therefore, now to raise a plea that the goods have attained scrap value is a plea raised only to wriggle out of their liability to the bank. The fact that goods had been released against deposit of money of equivalent value was sought to be established by Mr Haider by placing reliance on the averments made in paragraph 9 of IA No. 18/2008 filed in appeal no. 247/2007 whereby the petitioners had sought appointment of a local commissioner. The relevant observations, on which reliance was placed, reads as follows:

“Clause 5(b) of the consent decree categorically confirmed that the pledged stocks of a value of Rs 35,39,524.58 as per the stock statement annexed as Schedule 2 were in the power and possession of the respondent bank herein. This was the pledged value, the market value of the same in 1991 was in excess of Rs 1.5 crores. To establish this issue, it is submitted that after passing of the Consent Decree, goods of pledged value of Rs 12 lakhs were released and sold domestically and also exported at a value more than three times. Thereafter, as stated in the Memorandum of Appeal, the respondent bank arbitrarily stopped further deliveries even after subsequent deposit and repeated reminders. The obvious reasons for not doing so, because the respondent was not in a position to deliver the stocks from the godown within the premises of the Bank as covered by Clause 5(c) of the Consent Decree.”(emphasis is ours)

5.4. As regards the issue as to whether the bank was obliged to insure the goods Mr Haider drew our attention to clause 14 of the consent decree. Based on clause 14 of the consent decree (which we have already extracted hereinabove) it was contended that it was the obligation of the petitioners to insure the goods and having failed to do so they could not today raise the issue of misappropriation or loss of value of pledged goods. Mr Haider submitted that the fact remained that even though the obligation to insure the goods was that of the petitioners, as is indicated above, the Tribunal has attributed some part of the negligence both for non-grant of NOC as well as the loss of goods to the bank, and hence adjusted the sum of Rs 12 lacs towards the amount owed by the petitioner to

the bank. Therefore, these are issues which ought not to be taken into consideration once again by this court while adjudicating upon the issues raised in the writ petition.

6. We have heard the learned counsels for the petitioners and the respondents. After hearing the learned counsel and considering the material on record, as indicated by us in the opening part of the judgment, we find the Tribunal has not recorded with specificity and clarity findings on each of the issues raised and the evidence which propelled it to arrive at these findings.

6.1 But before we proceed further it would be appropriate to indicate the adjustments which, according to both counsels, the Tribunal has made in the amount decreed by the DRT. As indicated hereinabove, the DRT has decreed an amount of Rs 99,14,951.19/- in favour of the bank. Against this, based on the admission of the bank that it has received an amount of Rs 10,55,000/- from Swastik Motors and adjustments have been accorded on this count. The extensive submissions made in the writ petition with regard to Swastik Motors, were, according to us, unnecessary. Similarly, the adjustments have also been granted in the sum of Rs 13 lacs in respect of, the amounts paid by the petitioners during the pendency of the appeal before the Tribunal. Lastly, as indicated hereinabove, an adjustment of Rs 12 lacs has been further ordered by the Tribunal towards what has been assessed by the Tribunal towards negligence attributable to the bank. In fact the amount decreed by the DRT has been reduced to Rs 63,59,951.19 if, the aforementioned adjustments are given effect to against the amount of Rs 99,14,951.19. On the said amount of Rs 63,59,951/- the Tribunal has granted interest at the rate of 10% per annum from 03.11.1998, i.e., the date on which the bank preferred an application with the DRT till payment or realization of the amount decreed.

6.2 In the background of the aforesaid adjustments the petitioners were before us confined their grievance to: its claim of set off/counter claim not being addressed; and adjustments had not been fully accorded for goods in lot one [i.e., clause 5(b) of the consent terms]. We may, however, point out in respect of adjustment of value of stock

argument with respect to non-grant of NOC and fixation of obligation to insure the stock had been raised. In so far as the set off/counter claim is concerned we had put to Mr Mehra as to whether a claim in regard to the same was pending before the Tribunal. Mr Mehra fairly conceded that an application claiming the damages for non-grant of NOC was pending before the Tribunal.

6.3 In our view the Tribunal has rightly come to the conclusion in paragraph 25 of its judgment that the petitioners having taken a stand in an affidavit filed that they reserve their right to press their counter claim/set off in the Faridabad court, and therefore that aspect of the matter could not then be adjudicated upon by the Tribunal. Relevant observations in that regard are contained in paragraph 25 of the DRT's order which is extracted hereinbelow for the sake of convenience:

“25. So far the question of counter claim and set off is concerned, I am of the view that the defendants are not entitled any set off or counter claim for the reasons firstly, because the defendants/JDs have already preferred counter claim before the Sub. Judge, Faridabad and despite direction and opportunity granted for this purpose, they did not get that case transferred to this Tribunal. Moreover, the defendants/ JDs have given affidavit that they reserve their right to continue their claim at Faridabad. Thus, they want to sail on two boats which is not permissible under the law. As stated above, the defendants/ JDs have filed affidavit stating that they reserve their right to press their claim for set off pending in Civil Court, Faridabad and therefore, I endorse the view of learned counsel for applicant/ decree holder bank that this court cannot enter into adjudicate upon the counter claim as the same is hit by ‘doctrine of election’ or ‘double jeopardy’.”

6.4 This being the position, in our view, no fault could be found with this approach. As regards the non-issuance of NOC, the DRT has made observations in paragraph 23 and 24 of its judgment. In nutshell the DRT came to the conclusion that time was of the essence in the issuance of the NOC and that the NOC which was finally issued on 30.01.1993 was a useless piece of document, since several conditions had been appended to the said NOC by the bank. Mr Mehra submitted before us that the Tribunal while

disagreeing with the said observations of the DRT that time was of the essence, did not advert to the efficacy of the NOC issued by the bank to the petitioners on 30.01.1993. We have already extracted the relevant clause, i.e., 9 of the consent terms which required issuance of NOC by the bank in favour of petitioner no. 1 within two days of passing of the consent decree so as to enable the petitioner no. 1 to avail loans and/or any bank facilities from other banks and financial institutions. At this point we may also advert to the said NOC. A perusal of the NOC dated 30.01.1993 would show that it is not conditional as was sought to be portrayed by the DRT. As a matter of fact, very rightly in our view, the bank in the NOC informs prospective creditors who would have been brave enough to advance loan to petitioner no. 1 that the properties (moveable or immoveable) of petitioner no. 1 bore a first charge of the bank. An approach of this kind, according to us, was not only fair but also transparent as it precluded the possibility, of a situation arising, whereby a creditor may perhaps have had advanced financial assistance to the petitioners without being aware of a prior first charge on the property. Such an approach protected the interest of the bank, which in law it is entitled to, by intimating to a prospective lender, its prior charge on the properties of petitioner no. 1. Importantly, what the bank ceded in favour of the prospective vendor, in order to enable the petitioners to avail of financial assistance, was the creation of a second/subsequent charge. Therefore, we do not find any problem with this aspect of NOC, i.e., the document by itself.

6.5 The Tribunal's finding with regard to the NOC is contained in paragraph 30, wherein after analyzing the pros and cons of the arguments of counsels of both sides it has found in nutshell that the bank had contributed to the negligence, in as much as, in failing to issue NOC within two days. This is apart from breach of other obligations, which has been attributed to the bank, such as failure to withdraw the cases filed against the petitioner(s). According to us, the issue with regard to the NOC could not have been disposed of in this manner. The issue before the DRAT was: as to whether the time provided in clause 9 of the consent term was of the essence. The Tribunal had to further

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determine: as to whether time continued to remain of the essence in respect of this aspect of matter. In this context the Tribunal had to examine perhaps the correspondences exchanged between the parties and their conduct in the intervening period. It was the case of the bank before the Tribunal that the issuance of NOC was unrelated to its obligations to pay amounts crystallized in the consent decree. The bank had also taken a stand that since a formal demand for NOC was made on 24.01.1993, the NOC was issued on 30.01.1993. We also notice that in the impugned judgment of the Tribunal that there is a reference to the fact that since the petitioners had objected to the conditions contained in the NOC, a fresh NOC was issued. There is, however, no reference in the impugned judgment as to what was the date of such a NOC, if any, issued by the bank.

6.6. The fact remains that the Tribunal had to determine one way or the other whether time was of the essence and continued to remain of the essence. We find there is no finding on this aspect. It is Mr Haider's contention that the bank has been penalized on this account, which is why the DRT ordered payment of interest from 03.11.1998. A similar observation in this regard has also been made by the Tribunal in paragraph 36 and 37 of the impugned judgment while commenting on the aspect of interest being granted by the bank. We are of the view that these observations of the DRT and the Tribunal, to which our attention was drawn, would not by itself do away with the obligation of the Tribunal to return a finding on this crucial aspect of matter.

6.7 As regards goods which are subject matter of clause 5(b) of the consent terms and were valued at Rs 35.39 lacs approximately, the Tribunal seems to be of the view, as noticed in paragraph 18, of the impugned judgment, that the petitioners did not make any request for disposal of the said goods so that monies could be recovered on disposal of the goods, and consequently, adjusted towards the amounts outstanding in terms of the consent decree. As noticed above, the petitioners' claim that they had from time to time by writing communication sought release of goods. By way of example our attention was drawn to the following letters 28.11.1991, 23.01.1993, 15.07.1993 and 16.11.1993. The

Tribunal has not discussed the impact of any of these documents and we are left guessing as to whether a request was made or not made. Adjustment if any warranted on this account has not been dealt with once again in the manner, in which, it ought to have been received the attention of the Tribunal.

6.8 As regards the second lot of goods which are clause 5(c) goods valued at Rs 26.53 lacs approximately the petitioners had claimed pilferage by the bank. The petitioners have submitted that admittedly this lot of goods which was in the godown rented out by the bank was contained in 3000 boxes whereas, what was retrieved was only 60 boxes. Based on this, the petitioners had argued before us, that they ought to have been given adjustment of the entire value of goods amounting to Rs 26 lacs. The Tribunal has made an observation on this issue in paragraphs 31, 32 and 33 of the impugned judgment. For the sake of convenience the same is extracted hereinbelow:

“31. The goods were lying in possession of the borrowers under the head 5(b). For that the bank cannot be blamed. The appellants themselves are liable for the same. The appellants cannot claim set off of any amount in respect of the goods mentioned in clause 5(b) of the consent decree. Although the borrowers were supposed to get the goods insured, yet needful was not done. There is not even an iota of evidence which may go to reveal that the judgment-debtors had ever asked the bank to dispose of the hypothecated/ pledged property and get its value adjusted towards the loan. They, like the bankers, twiddled their thumbs and allowed the time to pass. Does the law ever help the sleeping men? Neither the bankers nor the judgment-debtors cared for the national property. The bankers are interested only in advancing the loan but not in getting the same back.

32. However, bank is partially liable for the goods mentioned in clause 5(c) pertaining to Rs 26,53,392.98. Out of this goods, 60 boxes were recovered. The bank was supposed to take complete measures in preserving the goods even though the judgment-debtors failed to insure the same. It was the duty of the bank to return the goods in good condition or in bad condition. What surprises the court the most is as to where those goods have vanished. Has the bank committed civil as well as criminal breach of trust in respect of the abovesaid 2940 boxes. Why the bankers are tight-lipped about the same. It

is painful and galling that the bank has approached the facts of this case with the fig leaves of roundabout expression.

33. This is a case of contributory negligence for which both the parties are equally liable to the extent of 50% loss each. So, I find that the borrowers are entitled to adjust a sum of Rs 12 lakhs on that count as 60 boxes were got recovered.”

6.9. A reading of the observations made in aforementioned paragraphs leaves us guessing as to whether what is stated in paragraph 31 with regard to the petitioners/ JDs having never asked the bank to dispose of the hypothecated/ pledged property applied only to goods in clause 5(b) or also to goods in clause 5(c) of the consent terms. If the observations made in paragraph 31 applied to goods in clause 5(c) as well then perhaps there would be a case of contributory negligence on the part of the petitioners as has been found in paragraph 33 of the impugned judgment. In respect of goods both of the category referred to in clause 5(b) and 5(c) of the consent terms, the petitioners aver the request was made for release of goods. Some of these letters have been referred to by us. Without a discussion it is not known as to how the Tribunal reached a conclusion there was “no evidence” on this aspect whether the letters related to goods falling in clause 5(b) or 5(c) of the consent terms or even both required discussion. It is not the case of the bank before us that letters referred to were not on record. In paragraph 31 of the impugned judgment there is also an observation to the effect that insurance was not taken. Dehors the issue whose obligation it was (which is an issue which we have discussed below) it was incumbent on the Tribunal to discuss whether this obligation applied to both category of goods (i.e. clause 5(b) and 5(c) goods). The net sum and substance is that the findings in relation to goods related to clause 5(b) and 5(c) of the consent terms are so intertwined that there is no clarity in the impugned judgment as to which observation or finding relates one or the other category of goods, [i.e., 5(b) or clause 5(c) of the consent terms]. This according to us is not a satisfactory approach. The Tribunal needs to deal with the findings of the DRT, the arguments, the material on record and then return its own findings qua each of the two category of goods falling in

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clause 5(b) and 5(c) of the consent terms. The Tribunal also, similarly, have to justify the rationale for restricting the adjustment in respect of clause 5(c) comes to only Rs 12 lacs.

7. In so far as the submission of the petitioners with regard to failure on the part of bank to take due insurance was concerned we find ourselves in the agreement with the conclusion of the Tribunal. As rightly held in terms of clause 14 of the consent terms it is crystal clear that the obligation to insure the goods was that of the petitioners. However, what impact it would have on the monetary adjustment will have to be clearly delineated.

8. Similarly, as regards adjustment on account of monies received from Swastik Motors, we are ad idem with the approach of the Tribunal whereupon the Tribunal noticing the order dated 24.01.1999, passed by this court, it has accorded an adjustment of Rs 10.55 lacs.

9. In these circumstances, we propose to remand the matter to the Tribunal as agreed to counsels for both the petitioners and the respondent with respect to the following aspects:

- (i) Whether time was of the essence in issuance of the NOC by the bank as contemplated in clause 9 of the consent terms?
- (ii) Whether time continued to remain of the essence till the issuance of the NOC by the Bank?
- (iii) If the answer to the issue nos. (1) and (ii) is in the affirmative then what would be the monetary adjustment, if any, that would accord in favour of the petitioners?
- (iv) Whether the petitioners had sought release of the goods falling in clauses 5(b) or 5(c) of the consent terms or both? If so, whether it would entail monetary adjustments to be made in arriving at the liability of the petitioners?
- (v) Whether the goods falling in clause 5(c) of the consent terms had disappeared as alleged by the petitioners?
- (vi) If the answer to issue no. (v) is in the affirmative, who was responsible for the same?

(vii) If the issue nos. (v) and (vi) are found against the bank, to what extent the pecuniary liability of the petitioner would stand adjusted?

(viii) Whether the bank would be entitled to a recovery certificate in terms of a consent decree dated 15.11.1991? If so, to what extent.

9.1. We would expect the Tribunal to return the findings on the aforesaid issues within a period of eight weeks from today.

9.2 To begin with there was a consensus between the counsels for the parties that both the rate of interest and the period of interest, as found by the Tribunal in the impugned judgment, is in order. We note, however, that after arguments in the matter were concluded and the matter was listed in court on 02.05.2011 for directions. Mr.Mehra has submitted a short note seeking to contest the interest awarded by the Tribunal. We cannot countenance this approach. Nevertheless, in any event we are of the view that award of simple interest, both pendente lite and for the further period at the rate of 10% p.a. is reasonable. Furthermore, the period of commencement of interest w.e.f. 13.11.1998 is also in order, as the bank approached the DRT only on that date by way of an application for initiation of action on its consent decree. The bank, therefore, correctly was made to suffer for the interia shown between the date of the consent decree and date on which the said application was moved before the Tribunal. Therefore, findings in this regard have not been disturbed by us.

9.3 We are also making it clear that in so far as the NOC is concerned the remand is restricted to the issues culled out above. We find nothing wrong with the NOC by itself, contrary to what the DRT had held. However, what impact it would have in the Tribunal coming to the conclusion as to whether time was or was not of the essence is a facet on which the Tribunal will dwell in returning a finding on the issues crystallized above.

10. Before the conclude, we must refer to one last aspect of the matter which is, Mr Mehra during the course of his arguments had submitted that the petitioner would want to deposit the decreetal amount with the bank as per the judgment of DRT and obtain release of all securities available with the bank, pending the decision of the Tribunal, on

remand. We have no doubt view that if an application of this nature is made to the Tribunal, it would consider the request of the petitioners in accordance with law.

11. With these observations the writ petition is disposed of.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 10, 2011

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