

\$~29

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: September 15, 2014

+ **W.P.(C) 6090/2014 & CM No. 14812/2014**

M/S CONTINENTAL CONSTRUCTION LTD. & ANR..... Petitioners

Through: Mr.Dhruv Mehta, Sr.Advocate with
Mr.BhoumikNayyar, Advocate

versus

STATE BANK OF INDIA & ORS Respondent

Through: Mr.S.L.Gupta, Mr.J.P.Gupta,
Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
15.09.2014

%

1. At the outset, we may record that petitioner No.2, M.S. Bassi, is not a defendant in O.A. No. 37 and 39/1998. M.S. Bassi has been arrayed as petitioner No.2 as he is the Director of the petitioner No.1 company. Therefore, we will treat the present petition filed by petitioner No.1 only, as we are only concerned with proceedings in O.A. Nos. 37 and 39/1998

2. Pursuant to the last order, copy of the order dated 02.09.2014 passed by the Debt Recovery Tribunal-II, Delhi (DRT) has been placed before us. The said order does not record the presence of the counsel for

the respondent-bank. It also records that matter has been adjourned from time to time and was posted for final hearing on 20.08.2014 and adjourned for 02.09.2014. On the said date, counsel for the parties were required to address arguments, but again, request for adjournment had been made as the counsel for the respondent bank and the petitioner i.e. principal borrower/guarantor were not present. The Tribunal has reserved the judgment to be pronounced on 18.09.2014, after noticing the legislative mandate under Section 19(5)(A) and Section 19(24) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

3. We are not required to comment on the order dated 02.09.2014 of DRT as this order is not a subject matter of the present writ petition, but the counsel for the petitioner and the respondent-bank state in unison, that the DRT may be requested and asked to hear arguments in O.A. No. 37 and 39 of 1998 as it would be in the interest of justice. We take the said statement on record and ask the DRT to hear the counsel for the parties, on 18.09.2014, on merits, the date which is fixed for pronouncement of orders.

4. The aforesaid reprieve has been recorded at the request of the counsel for the parties before us. While giving aforesaid direction, it is noticed that the counsel for the respondent-bank has stated that he had

addressed arguments on 02.09.2014 after the order reserving judgment had been passed and at that time, counsel for the petitioner and the guarantor were not present.

5. The main issue raised in the present petition emanates from the order dated 20.08.2014 passed by the DRT, directing that O.A. Nos. 37 and 39 of 1998 should be delinked from O.A. No. 38/1998. This order was challenged before the Debt Recovery Appellate Tribunal (DRAT) and the said appeal stands dismissed by the impugned order dated 01.09.2014 of the DRAT.

6. Learned counsel for the petitioners submits that the order dated 01.09.2014 should to be set aside as by an earlier dated 15.01.2014, DRT had directed that O.A. Nos. 37/1998 and 39/1998 should be listed and simultaneously tried and disposed of along with O.A. No. 38/1998. It is further submitted that order dated 15.01.2014 is subject matter of another appeal filed by the respondent bank, still pending before the DRAT. Our attention is drawn to the fact that in O.A. No. 38/1998, an application has been filed for cross examination of the witnesses, who have filed affidavits in support of the claim of the respondent-bank. Decision on the said application is to be pronounced on 22.09.2014.

7. Learned counsel for the respondent bank, has submitted that the claims raised by the respondent-bank in three O.As are based upon the separate transactions and to this extent, the O.As are not connected, though the respondent bank and the principal borrower are the same. He submits that parties in three O.As are also different, because in O.A. No. 37/1998, there is only one guarantor and in O.A. No. 39/1998, there is no guarantor. In O.A. No. 38/1998 there are multiple guarantors including M.S.Bassi who is not a party to O.A. Nos. 37 and 39 of 1998. Learned counsel for the petitioners does not dispute the factual position with regard to the parties to the O.As, but, submits that the transactions are inter-connected and the defence is common.

8. The order dated 15.01.2014 passed by the DRT reads as under:

“Defendant No. 4 has filed IA No. 28/14 for consolidation of OA No. 37/98, OA No. 38/98 and OA No. 39/98. The transactions are independent, the applicant is the same and the principal borrower is the same. Instead of consolidation there could be a simultaneous trial and disposal of all the cases and the parties can be permitted to lead evidence in one case which can be read in all the cases. This includes documents as well. OA No. 38/98 shall be treated as the lead case. IA is allowed as above.

Defendants have filed the evidence. For completion of exhibition of documents posted before Registrar to date already fixed i.e. 17.1.2014”.

(emphasis supplied)

9. The aforesaid order specifically records that the transactions which are subject matter of the three OAs are independent but the applicant-bank and the principal borrower are the same. Therefore, instead of consolidation, there could be simultaneous trial and disposal of all the cases and the parties can be permitted to lead evidence in one case which can be read in all the cases, and this includes documents as well.

10. It is pointed out and not disputed before us that evidence in O.A. No. 37/1998 was filed by the respondent-bank in March 2012 and by the petitioners and the guarantor in May 2012. In O.A. No. 39/1998, the respondent bank had led evidence by way of affidavits more than ten years back in April, 2002 and the petitioner i.e. the principal borrower, the only opposing party in the said O.A. had filed evidence by way of affidavit in April, 2004. The evidence in O.A. No. 38/1998 was filed by the respondent bank in 2011 and thereafter, evidence was filed by the principal borrower and the guarantors including M.S.Bassi in 2012. We have quoted the order dated 15.01.2014 which states that the defendant No. 4 had filed IA No. 28/14 for consolidation of O.A. Nos. 37/1998, 38/1998 and 39/1998. The said defendant, M.S.Bassi, who is the stated guarantor in O.A. No. 38/1998 is not a party against whom the respondent-bank has sought any decree or relief in O.A. Nos. 37/1998 and 39/1998. The application for consolidation which is noticeable was filed only in 2014 by

the said M.S.Bassi as the application was numbered IA No. 28/14. This factual position is not disputed and accepted/admitted.

11. Thus, it is clear that the application for consolidation and for leading evidence in one case was not filed from 1998 till 2014 by any of the parties. It was filed after evidence by way of affidavits had been filed by the parties.

12. The petitioner has not filed any application for cross-examination of deponents who have filed affidavits in support of the claim made by the respondent bank. M.S. Bassi, it is stated, has filed an application in 2013 in O.A. No.38/1998. M.S. Bassi as noted above is defendant No.4 in O.A. No.38/1998 and is not a defendant in other cases. Orders on the application seeking cross-examination have been reserved to be pronounced on 22.9.2014. The application, for consideration as noted above, was filed in year 2013 and not before. We did not think it will be appropriate and correct at this stage to accept the contention of petitioner that the application, filed in 2013 by M.S. Bassi, for cross-examination in O.A. No.38/1998 was with object and purpose that cross-examination of deponents should and would be allowed in O.A. Nos.37 and 39/2009. This argument is farfetched and fallacious.

13. At this stage, we may notice that O.A. Nos. 37 and 38 of 1998 were allowed vide order dated 26.05.1999. The petitioner i.e. the principal borrower, had thereupon, filed appeals against the decision in O.A. Nos. 37 and 38 of 1998 before the DRAT. Two separate appeals were preferred. One of the issues raised in the appeals was whether DRT was justified in disposing off the original applications without recording or permitting the parties to lead evidence. The DRAT passed an order directing that the parties should led evidence before them and the matter need not be remanded. The order passed by the DRAT dated 29.09.2010 in an appeal arising out of O.A. No. 38/1998 was made subject matter of the Writ Petition (C) No. 7758/2010. The said writ petition was allowed and it was directed that the parties should lead evidence before the DRT and the O.A. No. 38/1998 should be disposed of within a period of six months. The said order was passed by consent. In view of the said order, the other appeal was also disposed of and the adjudication order dated 27.05.1999 in O.A. No. 37/1998 was set aside and the DRT was asked to dispose of the said O.A. after giving the opportunity to the parties to lead evidence. The direction was given that the decision should be rendered within a period of six months.

14. We have referred to the aforesaid position to highlight that both the High Court as well as DRAT had directed that O.A. Nos. 37 and 38 of

1998 should be disposed of within six months. It is apparent that during the period of six months or till 2014, no application for consolidation etc. was filed. The application for consolidation of O.As by one of the guarantor in O.A. No. 38/1998 who was not a party or defendant in O.A. Nos. 37 and 39 of 1998, therefore, should not have been allowed. The parties throughout had been treating the three O.As as separate and distinct and in spite of the orders and directions issued by the High Court and the DRAT, it was never the contention that the three O.As should be dealt with and evidence should be led together. The order dated 05.09.2011 passed by the High Court, in the opening paragraph itself, indicates that the petitioner herein had filed two appeals i.e. Appeal No. 155/2000 and 156/2000 arising out of O.A Nos. 37 and 38 of 1998. It had preferred the said writ petition only qua the proceedings arising out of O.A. No. 37/1998 (*sic.*, 38/1998). Thus, it is clear that the petitioners were treating the aforesaid O.As as separate and distinct and not one connected proceeding where common evidence could be recorded/lead.

15. The learned counsel for the petitioners has submitted that the order dated 15.01.2014 passed by the DRT has been made subject matter of an appeal before DRAT and the said appeal is pending. We perceive that the said appeal should have been taken up along with Miscellaneous Appeal No. 327/2014, which was preferred by the petitioner before the

DRAT. However, the said error or mistake does not make any difference as the issue was examined by the DRAT in its order dated 01.09.2014, while dealing with the appeal preferred by the petitioner herein. The effect of the said order is that the appeal preferred by the respondent bank against order dated 15.01.2014 is rendered infructuous. We have also examined the merits and whether or not, order dated 15.01.2014 should have been passed in the facts of the present case. We have decided the question in favour of the respondent bank.

16. At this stage, learned counsel for the petitioners borrowers submits that there is no power of review and the order dated 15.01.2014 would operate as res judicata. He submits that the order dated 20.08.2014 is not a speaking order. We are not inclined to accept the said submissions for the reason that the order dated 15.01.2014 was a procedural order and as such, question of “review” would not arise. The order does not deal with the merits. Order dated 15.01.2014 was passed for convenience, and with the object to avoid duplicacy and to expedite the disposal of the O.As. It was specifically recorded in the order dated 15.01.2014 that the transactions were independent, though the bank and the principal borrower were same. DRT did not direct consolidation and erroneously did not notice that evidence has already been led by the parties in O.A. Nos. 37 and 39 of 1998. Had the said fact been noticed, direction to lead evidence

in one case, would not have been made. The order was passed on a wrong and factually incorrect premise. Thus when it was noticed that proceedings in O.A. Nos. 37 and 39/1998 are getting stalled and delayed, appropriate and fair order has been passed.

17. The writ petition is dismissed after recording the consent of the counsel for the parties for arguments to be addressed before the DRT on 18.09.2014.

18. At this stage, learned counsel for the petitioner submits that they would like to move an application for cross examination of the deponents, who have furnished affidavits. This is seriously objected to and opposed by the counsel for the respondent bank on various grounds, as this would delay the matter and this is not the subject matter of the writ petition. We are not examining the said issue or making any observation in this regard. If any such issue or contention is raised, the DRT can deal with the said contention.

Dasti under signature of the Court Master.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

SEPTEMBER 15, 2014/akb