$~29.

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

\+ W.P.(C) 6502/2015

% ***Judgment dated 10th July, 2015***

PUNJAB & SIND BANK ..... Petitioner
Through : Mr.Rajender Wali, Adv.

versus

M/S AVIN LIGHT INDUSTRIES
PVT. LTD. & ORS ..... Respondents
Through : NEMO.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (*ORAL*)

CM APPL.NO. 11841/2015.

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

W.P.(C) 6502/2015

3. By the present writ petition filed under Articles 226 and 227 of the Constitution of India, the petitioner seeks grant of a writ, order or direction in the nature of certiorari thereby quashing/setting aside the order dated 17.12.2014 passed by the Debts Recovery Appellate Tribunal (hereinafter referred to as the DRAT) in Appeal No.220/2013 in O.A.No.180/1998 in Appeal No.5/2013.
4. Mr.Wali, learned counsel for the petitioner, submits that the order dated 17.12.2014 passed by the DRAT suffers from various legal infirmities, the

same is unjust and illegal and is, thus, liable to be set aside. It is further contended that the Appellate Tribunal has failed to take into consideration that respondent no.3 had created a charge of negative lien in favour of the petitioner Bank on 21.10.1993 by executing an undertaking that he would not sell the property bearing no.107, Wazirpur Industrial Area, Delhi, to any person being a true recorded and lawful owner, without prior permission of the Bank. It has also been submitted before us that her husband, Sh.Manohar Lal Chawla, was aware that her wife had given such an undertaking and the transfer made by respondent no.3 in favour of respondent no.1, on the basis of the Agreement to Sell, Power of Attorney, etc., on 31.07.1996 is illegal.

5. Mr.Wali also submitted before us that the DRAT has failed to consider that any document executed after the undertaking given to the Bank is of no value. Counsel further contends that the DRAT has also failed to consider that under Section 53 of Transfer of Property Act every transfer of immovable property, made with an intent to defeat or delay the creditors, shall be voidable at the option of the creditor.

6. We have head learned counsel for the petitioner and also gone through the order passed by the DRAT.

7. It would be useful to notice the necessary facts of this case.

8. A loan was advanced by the petitioner Bank to M/s Rider Poly India, respondent no.2 herein. A cash credit hypothecation limit of Rs.20.00 lakhs was granted by the petitioner Bank on 20.10.1993, besides a bill purchase facility of Rs.2.00 lakhs was also granted, in favour of respondent no.2. Both these facilities were granted against hypothecation of stocks, raw material and finished goods i.e. canvass shoes, PVC chappals, etc. The loans were secured by pledge of LIC Policy owned by Sh.Mohan Lal Chawla, who was one of the borrowers and defendant in

the Original Application before the DRAT. Equitable mortgage was also created by Sh.Sudhir Kumar Khurana by depositing title deeds of the property measuring 200 sq. yards bearing, rectangle no.39, Killa no.14 and 17, situated in the area and abadi of Samai Pur, Delhi. The Bank also claimed negative lien in respect of the property measuring 400 sq. yards, known by the number 108, Wazirpur Industrial Area (Group), Delhi. This undertaking was furnished by Smt.Neelam Chawla. The Original Application filed by the petitioner Bank was allowed by the Tribunal vide order dated 1.5.2002, wherein it was held that the Bank was entitled to recover the amount claimed from Sh.Mohan Lal Chawla, Sh.Sudhir Kumar (defendant no.3) and Smt.Neelam Chawla (defendant no.4), who were held jointly and severally liable. Thirty days time was also granted to pay the amount. It was also directed that in the event of the defendants' failing to deposit the amount, the same could be released by sale of mortgaged property as also by sale of the property under negative lien. Challenge made to the said order was unsuccessful. When the recovery proceedings were initiated to recover the amount by sale of mortgaged property as also the property alleged to have been charged with negative lien, respondent no.1 herein being the owner and in possession, filed objections before the Recovery Officer. As per the objections, the property at Wazir Pur Industrial Area belonged to him and not to Smt.Neelam Chawla, as no lien in respect of the said property was created, and a simple unregistered undertaking cannot create a lien in favour of the Bank. Respondent no.1 claimed itself to be the *bonafide* purchaser of the property from the title holder. The objections filed by respondent no.1 were dismissed by the Recovery Officer. An appeal filed before the Tribunal also met with the same fate. Respondent no.1 then approached the Debts Recovery Appellate Tribunal, where the appeal was allowed vide order dated 17.12.2014, which has led to the filing of the present writ petition by the petitioner Bank.

9. The legal question, which arises for consideration, is that whether a negative lien can be created with respect to an immovable property on the basis of an affidavit and the affidavit can be relied upon to enforce the right of negative lien.

10. It may be noted that the DRT after taking into consideration the entire chain of documents noted that "*.... Original of these documents are also produced. Thus, there cannot be any dispute that by way of Agreement to Sell, Will and Receipt dated 31.7.1996 M/s Avin Light Industries Limited had obtained the right, title and possession in respect of the property".*

11. In the case of ***Haryana Financial Corporation v. Gurcharan Singh and Another***, reported at 2013 (15) SCALE 296, the Supreme Court of India considered the provisions of Section 59 of Transfer of Property Act. The Court also taken into account that in view of Section 59 of the Transfer of Property Act when there is a mortgage, other than the mortgage by deposition of title deeds, it can be effected only by registered instrument.

12. It will also be useful to refer to the case of ***K. Muthuswami Gounder v. N. Palaniappa Gounder*** reported at (1998) 7 SCC 327, wherein it was held as under:

> "17. The document, Exhibit A-6, security bond does not in substance offer suit property by way of security. Even giving the most liberal construction to the document, we cannot say that a charge as such has been created in respect of the suit property for money to be decreed in the suit. All that it states is that in the event of a decree being passed not to alienate the property till the decree is discharged, which is a mere undertaking without creating a charge. Therefore, we agreed with the finding of the High Court that the document as Exhibit A-6 is not a charge. If that is so, the suit filed by the appellant has got to be dismissed."

13. In the present case as well, it is not in dispute that the property situated at Wazir Pur Industrial Area was neither mortgaged to the Bank nor any deed of mortgage was registered except that an undertaking was furnished.

14. Since respondent no.1 herein was neither a party to the Original Application, the only opportunity available to respondent no.1 to raise the objections with respect to the creation of a negative lien and to challenge the final order passed by the DRAT was at the stage of recovery proceedings. This fact has also been noticed by the Tribunal and in our view this could require no interference.

15. The grant of loan in this case is not a matter of dispute nor it is in dispute that the borrowers had mortgaged the property situated at Samai Pur, Delhi. As rightly held by the Debts Recovery Appellate Tribunal that a mere undertaking would not create a negative lien, neither any mortgage/lien was registered nor title deeds were transferred. Based on the original documents, which were produced before the Debts Recovery Tribunal, The Tribunal has rightly noticed that by way of series of documents dated 31.7.1996, respondent no.1 had obtained right, title and possession in respect of the property situated at Wazir Pur Industrial Area, Delhi. This factual position has not been challenged by the Bank.

16. In the absence of any registered instrument based on the decisions rendered by the Supreme Court of India in the case of ***Haryana Financial Corporation*** (supra), it cannot be said that a negative lien was created in respect of the property situated at Wazipur Industrial Area.

17. The learned DRAT, in our view, has rightly allowed the objections filed by the Objector, respondent no.1 herein. It was strongly urged before the DRAT by respondent no.1, who was the appellant there, that no negative

lien would have been created as a negative lien cannot be created by mutually signing an affidavit.

18. In our view, the judgment passed by Debts Recovery Appellate Tribunal requires no interference. Accordingly, the writ petition is dismissed.

CM APPL.NO. 11840/2015.

19. Application stands dismissed in view of the order passed in the petition.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JULY 10, 2015
gr/msr