

Ladda(PS).

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8181 of 2016

M/s Sonu Textiles & Ors.

..Petitioners.

vs

Punjab National Bank.

..Respondent.

Mr. Rohit Gupta i/by Mr Yogesh K. Deshpande for the Petitioners.

Mr. Prathamesh Kamat i/by Ms Sapna Rachure for the Respondent.

CORAM : ANOOP V. MOHTA AND

A.S.GADKARI, JJ.

DATE : 6th December, 2016

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

1. Rule. Rule returnable forthwith. Heard finally by consent of parties.

2. The Petitioners/borrowers, by this petition, filed on 23 October, 2015, have challenged order dated 10th September, 2015 passed by the Debts Recovery Appellate Tribunal, at Mumbai (DRAT); whereby, order dated 9 September, 2014 passed by the Presiding Officer, Debts Recovery Tribunal (DRT-I,) Mumbai rejecting Miscellaneous Application

(I.A.) No.243 of 2012 in Original Application (O.A.) No. 802 of 2001. It was for directions to the respondent-bank to produce the concerned witness who has personal knowledge of the subject-matter before the court and for bringing the correct and true facts on record.

3. The basic background and synopsis of the litigation as relevant to consider the rival submissions including the conduct of the parties is as under:

In September 2001, the respondent bank filed an original application (O.A. No.802 of 2001) before DRT-I, Mumbai for recovery of its claim amount. On 29th November 2002, Respondent bank filed its claim affidavit along with Original documents “CAOD”) i.e. affidavit of Evidence). This CAOD was filed by Mr. John Martis, Bank Manager of the respondent bank. In July 2003, the respondent bank filed its Additional affidavit of evidence to bring on record certain documents. Additional evidence was also of Mr. John Martis, Manager of Respondent bank. In September 2003, the petitioners (borrowers) filed its written statement along with counter claim (original defendant no. 1 to 3). On 30th April 2004, a written statement of the respondent bank to the counter claim of the petitioners. In June 2005, the petitioners (borrowers) filed its CAOD (i.e. affidavit of evidence in OA) and the list of documents of the

petitioners (borrowers). On 15th July 2005, reply of the bank to claim affidavit of petitioners was filed. On 11th November 2005, an Application of the Petitioners to cross-examine Manager of the bank, ARM Branch. An Application filed by the petitioners was seeking permission to cross-examine Manager of the applicant bank who has filed the claim affidavit dated 30th April, 2004. On the same day, another application filed on behalf of the Petitioners to cross-examine Mr Suresh Kumar. An Application filed by the petitioners was seeking permission to cross-examine officer of the applicant bank who has filed the affidavit dated 19th January, 2005. On 11th October 2007, this Court in Writ Petition No. 1758 of 2007 (setting aside orders of DRT and DRAT) allowed petitioners to cross-examine only the Bank Manager. It reflects that this Court only permitted the Bank Manager to be cross-examined. No other person was allowed to be cross-examined. On 16th January 2009, the respondents Bank Manager, John Martis was cross-examined between the span of three years. On 2nd May 2012, Misc. Appln. No. 243 of 2012 (2nd application of the petitioners) to produce any person who has personal knowledge of subject matter. On 23rd November 2012, the Respondent bank filed reply opposing the application of the petitioners to cross-examine. On 9th September 2014, the DRT-I passed an Order rejecting the petitioners' application. On 10th September 2015, the DRAT rejected the

petitioners' appeal and held that party cannot be compelled to lead evidence and person who pleaded must prove his case with necessary documents coupled with evidence.

4. The reasons, given by the DRAT in paragraph No. 9, as relevant, are reproduced here under:

“9. On the perusal of the application filed by the appellant, he has not satisfied with the banker evidence and this court is of the view that this Court cannot compel a party to examine as particular witness to prove the case of the borrower since the burden of proof is always with the plaintiff which rebuttable presumption. All the more, it is not the criminal case and it is not this court which is interested to find out the truth behind the case. In civil cases the liability and its burden of the proof is always shifts depends upon the facts and circumstances of the case. The person who pleads must prove his case by producing the necessary documents coupled with evidence. This court has no power to compel opposite side to produce such witness to whom the appellant wanted to be examined to prove the appellant's case. The person who pleads “re-import theory” by examining his own witness and the documents if the respondent had not proved its claim against the appellant, the DRT will pass suitable orders in the O.A. The observation made by the Hon'ble High Court is only the reasons to allow the application. From the reading of the order one cannot come to the conclusion that finding has been given in all these issues by the Hon'ble High Court. If at all the parties relying on the observation, it is for the DRT to consider and pass suitable orders. Of course, the DRT has to consider the order passed by the Hon'ble High Court. On this observation, the appeal is dismissed with costs.

The O.A.No.802 of 2001 has filed for recovery of sum of Rs.85,63,486/- which was advanced in the year 2001 with interest @ 18.5% per annum at quarterly rests.

10. The DRT is directed to dispose of the matter expeditiously without granting any further adjournments.”

The relevant paragraph No.3 which contained reasons of the order dated 9th September, 2014 passed by the DRT-I, Mumbai, is reproduced below:-

“3. Heard the arguments of both counsels appearing for the parties. Before deciding the above application, it is pertinent to mention here that the procedure provided for disposal of the application under RDDB Act is summary in nature and the Tribunals are disposing of the matters by receiving documentary evidence along with the supporting claim affidavits of the respective parties. However, in necessary circumstances and in exceptional cases on the application of the parties, the witnesses are also tendered for oral examination. Since the claim of the Bank is mostly basing on the documents, the above procedure was prescribed and provided under the Act for speedy disposal of claims relating to Bank and Public Financial Institution. Even otherwise it is the prerogative of the applicant or plaintiff to lead evidence according to his choice as he being the dominus litus of its case. The plaintiff has to either stand or fall down on the strength of his own case and evidence. The defendants have no right to demand the examination of a particular witness or a particular person whose affidavit is not filed for the purpose of cross-examination. The attempts of the defendants in filing successive applications in the above matter are apparently for the purpose of gaining further time even though the matter is successfully dragged on from 2001 to today.”

5. We have reproduced both these orders and the basic reasons

as we are also in agreement with the views expressed by both the Authorities, considering the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short “R.D.D.B.”Act) and the Debts Recovery Tribunal (Procedure) Rules, 1993.

6. The contention that in view of the earlier Division Bench Judgment dated 11th October, 2007 in Writ Petition No. 1758/2007; whereby, by allowing the petitioners' writ petition it is recorded as under:

“15. Based on non-production of documents, contradictory stand of the bank, the documents being not supportive of each other and the controversy raised in the pleadings between the parties, it was a fit case where the request should have been allowed to completely and fully determine and decide the claim of the bank and the counter claim of the borrower. Thus, in the interest of justice and to fully and finally adjudicate the disputes between the parties, in our opinion, the application should have been allowed by the Tribunal. In the present case, we have no hesitation in coming to the conclusion that the Tribunal has erred in law in declining the request of the applicants for cross-examination of the Bank Manger.

16. In the result, the impugned orders dated 25th August, 2006 and 5th December, 2006 are quashed and set aside and the Petitioners are granted liberty to cross-examine the Bank Manager in accordance with law. Rule is made absolute while leaving the parties to bear their own costs.”

Therefore, the present application so filed by the Petitioners ought to have

been considered/granted. A reference was made to the provisions of Section 22 of R.D.D.B. Act also. The Division Bench while passing the above order, has also noted those provisions, specifically Rule 12 (6) of Debts Recovery Tribunal (Procedure) Rules, 1993 and a Judgment of the Supreme Court in the case of *Union of India Vs. Delhi High Court Bar Association*¹.

7. There is no issue with regard to the settled provisions of law as recorded in the judgment of the Division Bench. However, it is quite settled that the Court needs to consider the facts and circumstances in hand, keeping in mind the purpose and object of the R.D.D.B. Act. These provisions are with intent to expedite the procedure for early disposal of such application which is summary in nature but by keeping in mind the principles of natural justice. The provision and the power of Tribunal to call a witness and/or issue summons and/or issue appropriate order, or directions to creditors as well as borrowers and equally situated persons. However, this is always subject to the nature of application as well as purpose of such application including the conduct of the parties.

8. In the present case, after hearing the learned counsel appearing for the parties and even after going through the application so filed by the Petitioners and the reasons so given by the authorities which

1. AIR 2002 Supreme Court 1479.

are reproduced above and considering the restricted controversy so involved, we see that there is no case made out to interfere with the impugned order whereby the application of the Petitioners is rejected. It is not the case that no opportunity was given to the Petitioners to cross-examine the concerned Bank Manager. On the contrary, pursuant to the order passed by the Division Bench the petitioners in fact cross-examined the concerned witness which runs about 20 pages and the statement is made that the cross-examination was conducted for the period of three years i.e. 16th January, 2009 to 21st February, 2012. Now the application so filed with a specific prayer to produce the concerned witness who has personal knowledge of the subject-matter and/or for bringing true and correct facts on record in the background, in our view, was rightly rejected. It is settled that issue of calling witness of other side has been considered long time in *Sardar Gurbaksh Singh V. Gurdial Singh & Anr*² and the same has been considered as a bad and degrading practice. The relevant paragraph is reproduced as under:

“The practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his (the other party's) own witness is a bad and degrading practice. The true object to be achieved Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicious attaching to it. The story

2 AIR 1927 Privy Council 230

can then be subjected in all its particulars to cross-examination”

9. The R.D.D.B. Act provides the procedure to be followed and as the same has been followed in the present case, even by permitting the Petitioners to cross-examine bank manager, we see that there is no reason, now, to consider the case of the Petitioners, as submitted, based upon the said judgment of the Division Bench, so referred above. We are not here to record the judgment the way the petitioners want to read. The judgment, itself, made the provision very clear and by recording the reasons granted the opportunity to the Petitioners to cross-examine the concerned witness. The ratio of Judgment in our view cannot be extended to the applicant's prayer, wherein the request was to produce the witness who has personal knowledge of the subject-matter in such application. Even otherwise could not have been permitted to further delay the proceedings.

10. The consequences of production and/or non-production of the document by the bank or the person who wants to rely upon the same will face the consequences, if it is not produced and/or placed on record in accordance with law. The concerned Tribunal/Appellate Authority would consider the provisions of law while passing the final order if such application as filed and rejected at this stage of the proceedings.

11. The position of law so laid down further support the case of other side to reject the application so filed. This is in the background that, admittedly, Original Application No. 802 of 2001, is still pending for disposal for more than 15 years. The defence and/or issue, even if, can be agitated at an appropriate final stage of the proceedings.

12. Therefore, taking over all view of the matter, we see no case is made out to interfere with the orders passed by the Authorities. There is no perversity and/or illegality as such no interference in the impugned order is necessary.

13. The writ petition is accordingly dismissed. No costs.

(A.S. GADKARI, J.)

(ANOOP V. MOHTA,J)