

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO. 2066 OF 2014**

Maharashtra State Financial Corporation .. Petitioner
versus
Debts Recovery Appellate Tribunal,
Mumbai & Ors. .. Respondents

Dr. Arun Kumar Barthakur with Ms Maya Majumdar -- for petitioner.
Mr. Narayan Sahu with Mr. Srinivas Mudaliyar and Ms Ayushi
Anandpara i/b. Federal & Rashmikant for respondent no. 2.

**CORAM: D. H. WAGHELA, C. J. AND
M. S. SONAK, J.**

Date of Reserving the Judgment : 30 March 2016
Date of Pronouncing the Judgment : 02 April 2016

JUDGMENT :

1] By this petition under Articles 226 and 227 of the Constitution of India, the petitioner - Maharashtra State Financial Corporation (MSFC) challenges judgment and order dated 20 June 2014 made by the Debt Recovery Appellate Tribunal, Mumbai (DRAT) in misc. appeal no. 241 of 2012.

2] By the impugned judgment and order, DRAT has set aside order dated 7 August 2012 made by the Debt Recovery Tribunal (DRT) refusing to grant leave to the respondents to cross-examine MFSC's officer, who has filed affidavit in support of the original application seeking to recover loan amounts and interest from the respondents,

who are the guarantors for the repayment of said loan amounts.

3] Dr. Barthakur, learned counsel for MSFC has submitted that the impugned order made by DRAT is in violation of the Rule 12(6) of the Debts Recovery Tribunal (Procedure) Rules, 1993 (said Rules) and if the impugned order is allowed to stand, cross-examination shall have to be permitted, not merely in the cases at hand, but also in several other cases, arising out of the same transactions. Dr. Barthakur pointed out that loans have been advanced to over 500 persons for which, the respondents have offered themselves as guarantors. At no stage have the respondents disputed the execution of the guaranteed documents. On the premises that there is some scam in advance of loans, the respondents cannot, belatedly insist upon cross-examination. Dr. Barthakur submitted that the leave to cross-examine was made at a highly belated stage, when in fact the final arguments on behalf of MSFC were concluded and the matter was only posted for final arguments on behalf of respondents. Dr. Barthakur submitted that DRT by detailed reasoning had declined leave to respondents. DRAT however, without assigning any cogent reasons and further, without even adverting to the provisions contained in Rule 12(6) of the said Rules has reversed DRT. Dr. Barthakur submitted that the impugned order made by DRT suffers from perversity and therefore, this Court should interfere with the same in exercise of its extra ordinary jurisdiction.

4] Mr. Sahu, learned counsel for respondent no. 2 submitted that this is a scam, where MSFC has advanced loans to either non existing persons or to the same persons under different names. He submitted that DRAT, upon perusal of some loan applications has verified this position and only thereafter, granted leave to cross-examine. He

submitted that in case scam is established, respondents will stand discharged as guarantors and therefore, it is in the interests of justice that the impugned order made by DRAT, be not interfered with. He submitted that DRAT had also fixed the time limit for purposes of cross-examination and therefore, there was no question of delay in the proceedings. For all these reasons, Mr. Sahu submitted that this petition may be dismissed.

5] Learned counsel for the petitioner has stated that the respondents in this petition have been duly served and necessary proof of service is available in the record. He pointed out that respondents are only interested in delaying the matter and if the impugned order is permitted to stand, several proceedings, involving over 500 loanees, whose loans have been guaranteed by respondents herein, will be virtually stalled or rendered interminable.

6] In this case, MSFC has instituted several original applications against the respondents herein, as they are admittedly, the guarantors to the loans granted by MSFC in favour of loanees. Affidavit of one Pratap Gaikwad, Assistant Manager (Law) was filed some time in the year 2005, in support of original applications and the claims made therein. There is no merit in the submission made by Mr. Sahu that proceedings filed only against the respondents – guarantors, without institution of any proceedings against the loanees – principal borrowers are not maintainable. It is settled position in law that the liability of principal borrowers and the guarantors is joint and several.

7] At the stage when the final arguments on behalf of MSFC were concluded and the matter was posted for final arguments on behalf of respondents – guarantors, the respondents – guarantors filed an

application seeking leave to cross-examine Mr. Gaikwad, Assistant Manager (Law) MSFC on the basis of his affidavit filed in the year 2005. We have perused the detailed order made by DRT on 7 August 2012 and we are satisfied that DRT, upon consideration of the provisions contained in Rule 12(6) of the said Rules had rightly denied leave to cross-examine. DRT has rightly taken into consideration the inordinate and unexplained delay on the part of respondents in seeking leave to cross-examine. DRT has also rightly rejected the respondents contention in the context of institution of proceedings only against the guarantors and not against the principal borrowers. DRT has also rightly appreciated the position that the entire case of MSFC is based upon the documents of guarantee, the execution of which, has never been disputed by respondents. DRT, by adverting to relevant and cogent parameters had rightly dismissed the respondents application seeking leave to cross-examine at such a belated stage.

8] We are satisfied that DRAT has exceeded its jurisdiction or in any case, exercised discretion in a perverse manner, in reversing the well reasoned order made by DRT in this matter. DRAT has virtually brushed aside the issue of unexplained and inordinate delay, by observing that since the matter has protracted for 20 long years, there is no necessity of even directing DRT to go into the allegations. After these observations, DRT has itself, proceeded to grant leave to cross-examine, without assigning any cogent reasons and without even adverting to the provisions contained in Rule 12(6) of the said Rules, which provide that proceedings before DRT, in the normal course, must proceed only on the basis of affidavits and documents. No doubt, discretion is vested in DRT to permit cross-examination, if, the conditions specified in the Rule are duly fulfilled. However, this is by way of an exception and not as a matter of rule or routine. DRAT,

while failing to even advert to the provisions contained in Rule 12(6) of the said Rules as also some judicial pronouncements interpreting the same, has exercised discretion perversely. Relevant considerations have been ignored and irrelevant considerations appear to have been taken into account. MSFC, has accordingly, made out a case warranting interference with the impugned order.

9] Mr. Sahu, who appears for respondent no. 2 in the present matter, candidly admitted that on the basis of the impugned order, leave to cross-examine will have to be applied in practically all the pending cases and such leave, will have to be granted as, the facts and circumstances in each of these cases are the same. Therefore, if the impugned order is allowed to stand, leave to cross-examine will have to be granted, as a matter of course, in several matters concerning the same transaction, thereby, rendering such proceedings virtually interminable. All this, will only contribute to the very frustration of the objective behind enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the said Rules. The said Act came to be enacted to facilitate expeditious resolution of disputes concerning payment of dues to banks and financial institutions. In order that the tribunals constituted under the said Act are not fettered by technicalities, having regard to larger public interest, the tribunals have been freed from shackles of procedural law and are to be only guided by the principles of natural justice and fair play. The tribunals constituted under the said Act are required to bestow attention and give priority to the real controversy arising before them out of the special legislations. Tribunals therefore, cannot permit themselves to be derailed at the behest of parties resisting recovery, particularly where such parties fail to take any prompt steps for the assertion or enforcement of their alleged rights or privileges.

10] In the present case, there is no explanation whatsoever as to why the respondents did not apply for leave to cross-examine, no sooner, affidavit was filed for and on behalf of MSFC. The plea of delay was rightly upheld by DRT and DRAT was obviously not right in ignoring the same, merely on the ground that the proceedings, in any case, had protracted for over 20 years. Besides, the DRAT has failed to notice the impact of its order on several other cases arising out of the very same transaction. This was certainly a very relevant consideration, which has been totally ignored by DRAT in making the impugned order.

11] Mr. Sahu, learned counsel for respondent no. 2 made it clear that the respondents were not disputing the execution of guarantee documents. If this be so, there is no question of entertaining any vague pleas of scam or otherwise at the behest of such respondents. In any case, respondents had their own opportunity for producing their own documents, which they have failed to do. The loan applications, which DRAT has referred to, are really, not documents produced by MSFC and therefore, there is no question of grant of any leave to cross-examine, on the basis of such documents. The respondents contention that original applications should fail because MSFC has not proceeded against the principal borrowers, is quite misconceived and was rightly rejected by DRT. In the matters of this nature, documents, particularly the execution of which, is admitted, are of crucial importance. Respondents, having not denied the execution of the guaranteed documents, could not, at a belated stage, have insisted upon leave to cross-examine.

12] Rule 12(6) of the said Rules, reads thus :

“(6) The Tribunal may at any time for sufficient reason order that any particular fact or facts shall be proved by affidavit, or that the affidavit of any witness shall be read at the hearing, on such conditions as the Tribunal thinks reasonable:

Provided that after filing of the affidavits by the respective parties where it appears to the Tribunal that either the applicant or the defendant desires the production of a witness for cross-examination and that such witness can be produced and it is necessary to do so, the Tribunal shall for sufficient reasons to be recorded, order the witness to be present for cross-examination, and in the event of the witness not appearing for cross-examination, then, the affidavit shall not be taken into evidence and further that no oral evidence other than that given in this proviso will be permitted.”

13] In ***Union of India and Anr. vs. Delhi High Court Bar Association and Ors. (2002) 4 SCC 275***, the Hon'ble Supreme Court at paragraphs 22 and 23 has observed thus :

“22. At the outset, we find that the Rule 12 is not happily worded. The reason for establishing banking tribunals being to expedite the disposal of the claims by the banks, the Parliament thought it proper only to require the principles of natural justice to be the guiding factor for the Tribunals in deciding the applications, as is evident from Section 22 of the Act. While the Tribunal has, no doubt, been given the power of summoning and enforcing the attendance of any witness and examining him on oath, but the Act does not contain any provision which makes it mandatory for the witness to be examined, if such a witness could be produced. Rule 12(6) has to be read harmoniously with the other provisions of the Act and the Rules. As we have already noticed, Rule 12 (7) gives the Tribunal the power to act upon the affidavit of the applicant where the defendant denies his liability to pay the claims. Rule 12(6), if paraphrased, would read as follows:

1. The Tribunal may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit.. on such conditions as the Tribunal thinks reasonable;

2. The Tribunal may, at any time for sufficient reason order...that the affidavit of any witness may be read at the hearing, on such

conditions as the Tribunal thinks reasonable.

23. *In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order that the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to Rule 12(6) would certainly apply only where the Tribunal chooses to issue a direction, on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or defendant for the production of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, if it appears to the Tribunal, that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under [Article 226](#) and [Article 32](#) can decide questions of fact as well as law merely on the basis of documents and affidavits filed before it ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the Bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient."*

14] The Hon'ble Supreme Court has clearly held that it is common knowledge that hardly any transaction with the bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely

arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient.

15] In ***Sonu Textiles, Mumbai and Ors. vs. Punjab National Bank 2008(3) Bom. C.R. 889***, upon which, reliance was placed by Mr. Sahu for respondent no. 2 also lays down that there is no indefeasible right vested in the defendant to ask for cross-examination of the witnesses whose affidavits may have been filed in the proceedings. Further, it is held that it will be difficult to provide for any strait jacket formula universally applicable in the matter of grant or refusal of leave to cross-examine and it would primarily depend upon the facts and circumstances of each case. Further, even the said case lays down that leave to cross-examine can be granted only if conditions precedent provided in Rule 12(6) of the said Rules are complied with. In the present case, DRAT has not even adverted to the provisions contained in Rule 12(6) of the said Rules, much less, satisfied itself as to whether the conditions precedent therein had indeed been fulfilled.

16] In ***Standard Chartered Bank vs. Dharminder Bhohi and Ors. 2013(12) Scale 124***, the Hon'ble Supreme Court has held that intendment of the said Act is for speedy recovery of dues to the banks. In this backdrop the Tribunals are expected to act in quite promptitude regard being had to the nature of the lis and to see to it that an ingenious litigant does not take recourse to dilatory tactics. The principal purpose is to see that the recovery of dues which is essential function of any banking institution does not get halted because of procrastinated delineation by the tribunal. It is worthy to note that the legislature by its wisdom under section 22 of the said Act has provided that DRT and DRAT shall not be bound by the procedure laid down by the CPC, but shall be guided by the principles of natural justice,

subject to the rules framed. The tribunals have been conferred powers to regulate their own procedure, so as to expedite disposal of the applications and appeals before them. They have the character of specialized institutions with expertise and conferred jurisdiction to decide the lis in speedy manner so that the larger public interest, that is, the economy of the country does not suffer.

17] For all the aforesaid reasons, we set aside the impugned order dated 20 June 2014 and restore DRT's order dated 7 August 2012.

18] This petition is allowed in the aforesaid terms. There shall however be no order as to costs.

19] The parties to appear before DRT on 18 April 2016 and produce authenticated copy of this judgment and order. We request the DRT to dispose of the proceedings before it as expeditiously as possible considering that the proceedings have already protracted for over two decades.

20] All concerned to act on basis of authenticated copy of this judgment and order.

(M. S. SONAK, J.)

CHIEF JUSTICE

21] Upon pronouncement of the judgment today, learned counsel for respondent no. 2 requested for stay of the above order for a period of eight weeks. There is no justification for granting the request and the same is rejected.

(M. S. SONAK, J.)

CHIEF JUSTICE