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

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Date of Decision : April 27, 2016

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W.P.(C) 6978/2015

PUNJAB & SIND BANK

..... Petitioner

Represented by: Mr.Sanjay Podar, Sr.Advocate
instructed by Ms.Seema Gupta,
Advocate

versus

M/S WHITEFIELD INTERNATIONAL

PVT. LTD. & ORS

..... Respondents

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.R.S.Raju and
Mr.Anoop Prakash, Advocates

W.P.(C) 3258/2016

SUMEET SALUJA & ORS

..... Petitioner

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.R.S.Raju and
Mr.Anoop Prakash, Advocates

versus

PUNJAB & SIND BANK & ANR

..... Respondents

Represented by: Mr.Sanjay Podar, Sr.Advocate
instructed by Ms.Seema Gupta,
Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

CM No.7425/2016 in WP (C) No.6978/2015

CM Nos.13890-91/2016 in WP (C) No.3258/2016

Allowed subject to just exceptions.

CM No.7424/2016 in WP(C) 6978/2015

For the reasons stated in the application 64 days delay in filing the counter affidavit is condoned.

Application is allowed.

WP (C) No.6978/2015 & WP (C) No.3258/2016

1. It is trite that a judgment should commence by recording a brief overview of the facts of the case to set the scene followed by a succinct statement of the issues to foreshadow the structure, and only if relevant, a succinct statement of the procedural history of the case. Thereafter an impartial statement of the position of each party on each issue has to be recorded followed by a clear statement of the flaw in the losing party's position on each issue. Evidence supporting finding on facts and reference to law, standard or a fact upon which the conclusion is drawn needs to be noted.
2. Regretfully, the Debts Recovery Appellate Tribunal has, and if we may use the expression, with traces of contempt in its order, not followed the tenets of what a judgment should be. The result is, a second remand before the Debts Recovery Appellate Tribunal.
3. The 22 paged impugned order dated April 08, 2015 passed by learned DRAT traces the history till page 7 i.e. 1/3rd of the judgment is the narration of the procedural history, none of which was relevant save and except to

note that on an earlier occasion three appeals, one filed by the bank and the other two by the principal borrowers and guarantors were dismissed by a common order which was recalled by it requiring the appeals to be decided afresh.

4. Unfortunately, the next 14 pages of the order makes no reference to any document proved and exhibited before the learned DRT and as we would be noticing hereinafter, two issues concerning the procedure followed by the learned DRT and in respect of which an interim order was passed and the legality thereof had to be determined by DRAT has not even been touched upon.

5. Since the matter would be on remand before the learned DRAT, we do not comment upon the merits of the controversy and would note only such facts as are relevant to justify the remand.

6. But before noting said facts, we bring on record our anguish at the fact that the counsel for the bank has been litigating very callously and casually, without even bothering to maintain the record of the Original Application. When the two writ petitions were listed before us on April 19, 2016, we were appalled at the fact that learned counsel for the bank was having not even 1/4th of the record of the Original Application and was very keen to argue the two writ petitions. Since the impugned order passed by learned DRAT was sans any reference to the pleadings and the evidence and was more in the nature of a narrative of facts, we had directed personal presence of the General Manager Law of Punjab and Sindh Bank and today Sh.R.K.Bansal, General Manager Law, Punjab and Sindh Bank has appeared. He has been present throughout the hearing of the two writ petitions and expresses regret at the manner at which the counsel for the

bank had appeared on the last date. Fortunately today, after applying for and obtaining a certified copy of the record of the Original Application, with the services of a learned senior counsel, the bank has been able to put up a better show. Learned counsel for the bank concedes that when the writ petition No.6978/2015 was filed by the bank she did not have with her the record of the Original Application and as a matter of fact did not have with her the affidavit by way of evidence of the parties and the documents proved. Learned counsel further concedes that when she appeared to oppose the writ petition No.3258/2016 on which date the writ petition filed by the bank was listed, she did not have the evidence led before the DRT and the documents proved. Sh.R.K.Bansal, General Manager Law, Punjab & Sindh Bank very fairly states that a certified copy of the record of the Original Application had to be applied for after the order dated April 19, 2016 was passed by this Bench because the counsel conducting the proceedings before the Debts Recovery Tribunal and thereafter before the Debts Recovery Appellate Tribunal did not maintain the record of the Original Application. We wonder how a counsel can argue a first appeal, which is on law and facts, before an Appellate Tribunal laying a challenge to an order passed by the Tribunal i.e. the fora of original jurisdiction. This probably explains the fact that the learned DRAT has passed an order making no reference to the pleadings and the evidence as also ignoring that the legality of an order dated February 08, 2012 passed by the learned DRT concerning additional and secondary evidence permitted to be led by the bank which was challenged before it. There is no mention of the said order, much less any adjudication thereon. This is the reason why there is haziness before us and, what may appear to be to the reader of this judgment a situation akin to the

needle of a gramophone being stuck, we would be repeatedly using the expression '*it appears from the record*'.

7. On March 10, 2006 Punjab National Bank sanctioned a credit facility to Whitfield International Ltd. as under:-

- a) Packing credit : ₹250 Lakhs
- b) FOBP : ₹250 Lakhs
- c) FOBLC : ₹150 Lakhs

8. The aforesaid limits were enhanced by the bank from time to time. The last enhanced limits sanctioned by the bank are as follows:-

- a) Packing credit : ₹550 Lakhs
- b) FOBP : ₹500 Lakhs
- c) FOBLC : ₹1600 Lakhs

9. Petitioners No.1 and 2 of W.P.(C) No.3258/2016 are the Managing Director and Director respectively of Whitfield International Ltd. and stood as guarantors for repayment of the outstanding credit should the company fail to clear the same.

10. Certain immovable properties were mortgaged when the credit was first sanctioned and to secure the enhanced limit of the credit more immovable properties were mortgaged, and we need not note the details for the reason this is not necessary.

11. Five letters of credit in favour of the company were negotiated through the bank by presenting bills for collection by the bank and it transpired that the letters of credit as also the bills were fake, a fact which we can cull out from the Original Application filed by the bank to recovery outstanding dues in sum of ₹21,70,31,233.32 (Rupees Twenty One Crores Seventy Lacs Thirty One Thousand Two Hundred Thirty Three and Paise

Thirty Two only).

12. It appears that when this was detected by the bank, or we may say became the compulsion of the officers of the bank to regularize the account – and we say that it was the compulsion of the officers of the bank because along with the Directors of the Company the concerned officers of the bank have been charge sheeted by the CBI and are currently awaiting trial as accused for acts of cheating and forgery; petitioners No.1 and 2 of W.P.(C) No.3258/2016 offered to mortgage property No.B-34, Pamposh Enclave, Delhi on March 21, 2009. There is lack of clarity hereinafter as to whether a mortgage was created or not, and neither counsel is able to throw any light, but it appears that the parties have litigated as if a mortgage was created.

13. In the Original Application filed by the bank in the year 2009, claim in sum of ₹21,70,31,233.32 (Rupees Twenty One Crores Seventy Lacs Thirty One Thousand Two Hundred Thirty Three and Paisa Thirty Two only) has been raised as under:-

Limit	Outstanding Amount	Memoranda Interest	Total
Packing Credit	5,49,83,871/-	6,85,415/-	5,56,69,286/-
FOBLC	14,31,59,450/-	18,76,175/-	14,50,35,625/-
COD	1,62,01,029.32	1,25,293/-	1,63,266,322.32
Total	21,43,44,350.32	26,86,883/-	21,70,31,233.33

14. The pleadings in the Original Application are concededly a little hazy and do not plead specifically that the company had constructive notice of the fact that the bills presented by it to the bank for collection under the 5 LCs were dishonoured. But the order passed by the learned DRT which was challenged before the learned DRAT shows that the bank argued that the

borrower had constructive notice and additionally that it had dispensed with the notice. This was to negate the applicability of Section 93 of the NI Act, 1881 which enjoined upon the bank to intimate the borrower with a notice of dishonour of the bills in view of clauses (a) and (g) of Section 98 of the NI Act, 1881.

15. It appears that the bank was handicapped by the fact that CBI had seized considerable record.

16. During the pendency of the Original Application and probably at the stage when the parties had led evidence, the bank filed I.A.No.9/2011 seeking permission to file 46 additional documents and proving the same by leading secondary evidence. The borrower and the guarantors filed I.A.No.661/2011 praying permission to be granted to cross-examine the witness of the bank. Vide order dated February 08, 2012 the learned DRT allowed I.A.No.9/2011 filed by the bank and dismissed I.A.No.661/2011 filed by the borrower and the guarantors.

17. The borrower and the guarantors filed two appeals before DRAT registered as Appeal No.94/2012 and Appeal No.95/2012 laying a challenge to the order dated February 08, 2012 passed by the DRT; one appeal challenging the order dismissing IA No.661/2011 and the other allowing IA No.9/2011. The two appeals were admitted, but were dismissed on August 21, 2012 noting that in the meanwhile on May 21, 2012 the learned DRT had allowed the Original Application filed by the bank and had held the borrower and the guarantors liable to pay a sum of ₹12,83,97,399/- to the bank with interest @ 10.25% p.a. with effect from April 27, 2009, which order was modified later on by the learned DRT on September 24, 2012 whereby the amount held recoverable was increased to ₹21,70,31,233.32

with a rider that the bank would make adjustment(s) of amounts paid, and by which loosely worded order we understand that during the pendency of the Original Application some amounts were realized by the bank. While dismissing the two appeals the learned DRAT categorically observed that the legality of the said two orders would be decided by it in the appeal filed by the borrower and the guarantors against the order passed by DRT allowing the Original Application filed by the bank.

18. Two appeals came to be filed before the DRAT. One by the bank in which the grievance was to the rate at which interest had been awarded. The second by the borrower and the guarantors. It appears that an application filed by the guarantor when the bank initiated action under SARFAESI have been dismissed by learned DRT and against which order an appeal was filed before the DRAT.

19. On May 29, 2013 DRAT dismissed the appeal filed by the borrowers and the guarantors challenging the order dated May 21, 2012 passed by DRT on account of non-deposit of the required pre-deposit. The appeal filed by the bank was pending. For reasons which are unclear appeal filed by the borrower and the guarantors was restored by learned DRAT. Since learned DRAT did not stay the recovery proceedings, the borrower and guarantors filed W.P.(C) No.341/2014 in this Court which was allowed on January 20, 2014 directing DRAT to dispose of the appeal filed by the borrower and the guarantors on merits and staying recovery proceedings on deposit of ₹1 crore.

20. Thereafter the learned DRAT decided the three appeals, one each filed by the bank and the borrower and the guarantors against the order dated May 21, 2012 as also the subsequent order dismissing the

Securitisation Application filed by the guarantor. The impugned order is the one by which the three appeals were disposed of. It is dated April 08, 2015.

21. The bank continues to be aggrieved by non-consideration of its plea regarding rate of interest awarded by the learned DRT, which issue has not even been issued by the learned DRAT. The borrower and the guarantors continue to be aggrieved by the fact that their pleas have not been noted and hence not decided.

22. From the facts noted hereinabove it is apparent that the commitment by the learned DRAT in its order dated August 21, 2012 when appeal No.94/2012 and 95/2012 were dismissed observing that since a final order had been passed by learned DRT deciding Original Application filed by the bank the issue concerning legality of the order dated February 08, 2012 passed by learned DRT had to be made good.

23. Regretfully, the impugned order has not dealt with the legality of the order dated February 08, 2012 passed by learned DRT allowing IA No.9/2011 filed by the bank and dismissing IA No.661/2011 filed by the borrower and the guarantors.

24. This is the first infirmity in the impugned order passed by learned DRAT warranting a remand.

25. The second reason warranting a remand is that an appeal under Section 20 of the Recovery of the Debts due to Banks and Financial Institutions Act, 1993 against an order passed by DRT in proceedings initiated under Section 19 of the Act is an appeal on law and facts and thus any appellate order must make a reference to the evidence led.

26. The borrower had not disputed availing credit facilities but was

questioning the liability fasten on the factual premise that when the bills presented to the bank for collection under the five LCs were dishonoured no notice envisaged by Section 93 of the NI Act, 1881 was issued and much less served by the bank. The defence of the bank, albeit a little weak in the pleadings, was that notices were issued as and when a bill was dishonoured. An alternative defence of constructive notice as also another alternative defence under clauses (a) and (g) of Section 98 of the NI Act, 1881 was also raised on the plea that the borrower had dispensed with the requirement of the notice and knowing of the dishonour had promised unconditionally to pay the amount due. These issues warranted the learned DRAT to discuss the evidence and not write an opinion like a story. The learned DRAT appears to have been influenced by the pleadings and this explains not a single reference in the order passed by the learned DRAT to the documents which were exhibited. Unfortunately for us, as noted hereinabove, the learned counsel for the bank did not maintain a record of the Original Application and sadly enough argued the appeal before the DRAT and desired to argue the writ petition before us sans the evidence led and the documents exhibited before the learned DRAT.

27. Exercising writ jurisdiction, this Court is not to re-appreciate the evidence. It is trite that the concern of this Court would be to the decision making process and not the decision and we find that the decision making process adopted by learned DRAT is wholly perverse and illegal. The learned DRAT was to decide firstly whether the order dated February 08, 2012 passed by learned DRT rejecting request by the borrower and the guarantors to examine the witness of the bank and permitting the bank to file 46 additional documents and prove the same by leading secondary evidence

was justified. For if said order was found to be unjustified the matter had to be remanded to enable the borrower and the guarantors to cross-examine the witness of the bank and if the limb of the order permitting the bank to file 46 additional documents and prove the same through secondary evidence was also set aside, the matter had to be looked afresh by ignoring the said 46 documents, some of which appear to have been considered by the learned DRT. It was the duty of learned DRAT to refer to the dates and the documentary evidence (by referring to the exhibit mark) concerning whether the bank gave notice to the borrower as and when a bill presented to the bank for collection was dishonoured or whether the borrower had constructed notice and had waived the right to receive the notice and promised unconditionally to pay the amount due.

28. The two writ petitions are accordingly disposed of setting aside the impugned order dated April 08, 2015. The three appeals before the learned DRAT are restored with a direction that grievance of the bank concerning the rate of interest awarded to it by learned DRAT shall be decided and the grievance of the borrower and the guarantors concerning the amount held due and payable by learned DRAT shall be decided. The learned DRAT shall not resort to story telling and shall decide the appeal by referring to the documents proved and exhibited (and in the order shall refer to the exhibit mark) as also the oral evidence led. Such facts as are necessary to decide the controversy with reference to Section 93 and Section 98 of the NI Act, 1881 shall be noted with reference to whether the same are proved or not and if held proved, with reference to what evidence, shall be clearly brought out and if held not proved, it shall be indicated as to what is lacking in the documents proved and the oral evidence.

29. The appeals shall be decided without any condition of pre-deposit. Status quo with respect to the mortgaged property which remain unsold shall be maintained.

30. Decision shall be pronounced by learned DRAT within three months of the vacancy of the Chairperson, DRAT being filled up and for which the Registrar of learned DRAT shall ensure that the moment the vacancy is filled up. Appeal No.463/2012, Appeal No.61/2013 and Appeal No.139/2014 are listed for directions before learned DRAT which shall serve notice of listing of the three appeals upon learned counsel for the parties and proceeds to hear and decide the three appeals after summoning the record of the Original Application filed by the bank, which direction we issue because in a large number of cases we are finding that appeals are being decided by learned DRAT without even summoning the record of the Original Application filed by the bank.

31. There shall be no order as to costs in both the writ petitions.

CM Nos.13888-89/2016 in W.P.(C) No.3258/2016

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 27, 2016

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