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

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Date of decision: 03.02.2017

+ W.P. (C) 412/2015

M/S. DIMPI S. CREATIONS & ORS. Petitioners

Through Mr.Basant Aggarwal and Mr.
Shailendra Ojha, Advocates

versus

BANK OF BARODA Respondent

Through Mr.Arun Aggarwal and Mr.Taranjeet
Singh Sawhney, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The present writ petition is filed by the petitioners under Articles 226 and 227 of the Constitution of India to impugn the judgment dated 15.09.2014 passed by Debts Recovery Appellate Tribunal (hereinafter referred to as 'DRAT').

2. Petitioner No.1 M/s. Dimpy Creations is a partnership concern of petitioner No.2 and petitioner No.3. The petitioners are said to have had dealings with Benaras State Bank Limited. The said bank was amalgamated with the respondent bank on 20.06.2002. The petitioners sought financial assistance from the said Bank and were sanctioned a packing credit limit and FBP Limit (i.e. Foreign Bill Purchase) of Rs.25 lacs each. On 15.04.2001 the packing limit was temporarily enhanced to Rs.45 lacs with overall sanction

of Rs.50 lacs. Petitioner No.3 also offered a collateral security to secure the credit facilities by equitable mortgage of property being flat No. 105, Ground Floor, Building No. 129, Kingsway Camp, Nirankari Colony, Delhi. In 2001 the petitioners further availed a term loan of Rs.2 lacs and in pursuance of the same, executed a letter of confirmation of account/confirmation of balance and security.

3. The case of the respondent Bank is that the petitioners started committing defaults. The foreign bills negotiated for collection were returned unpaid. A legal notice was issued on 31.03.2004 calling upon the petitioners to pay a sum of Rs.64,89,688/- with interest in respect of the packing credit facility and a sum of Rs. 12,98,308/- in respect of the current account. The total amount of Rs.80,48,468/- was claimed. Thereafter, an OA was filed before the Debt Recovery Tribunal (hereinafter referred to as 'DRT'). Vide order dated 05.07.2012, the DRT allowed the petition of the respondent and held that the respondent is entitled to recover a sum of Rs.80,48,468/- with interest. It was also held that the respondent is also entitled to recover the debt by sale of the mortgaged property. Recovery certificate was also issued.

4. The petitioners thereafter filed an appeal before DRAT. The Tribunal by the impugned order dated 15.09.2014 dismissed the appeal of the petitioners.

5. The grievance of the petitioners against the said order dated 15.09.2014 essentially revolves around two aspects. It is firstly submitted that it is the case of the respondent themselves that they had sanctioned financial assistance for foreign purchase bill facility of Rs.25 lacs which was enhanced to Rs.45 lacs. Further, it is stated that the petitioners submitted

export bills to Benaras State Bank Limited. However, the said bank unilaterally shut its operation as it came under a moratorium. Due to non-negotiation of the bills by the bank and closing of its operations, the petitioner could not do any business and suffered losses. It is the contention of the petitioners that it is necessary for the respondent Bank to provide complete details of the bills which were submitted to Benaras State Bank Ltd. since the petitioners are not in possession of the said record, the same having been destroyed in a fire. However, the record of the foreign bills submitted by the petitioners with Benaras State Bank Ltd. would be in possession of the respondent Bank, copies of which should be supplied to the petitioners.

6. The petitioners moved an application before DRT under Section 22 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 seeking the relief that the respondent be directed to produce the record of the foreign bills submitted by the petitioners to Benaras State Bank Ltd. and the copies of the same may be supplied to the petitioners.

7. DRT by order dated 22.04.2008 dismissed the said application seeking details of foreign bills. It noted that the respondent Bank has not claimed any amount in respect of the foreign bill purchase facility granted and hence, the application filed by the petitioners was frivolous and baseless. Against the said order dated 22.04.2008 of DRT, the petitioners filed an appeal before DRAT. DRAT vide its order dated 19.11.2009 directed that the bank shall supply photocopies of the foreign bills/export bills which are available with them. It also directed the bank to file an affidavit that copies of the bills supplied are the only bills available and no other bills are available with the Bank. In pursuance of the orders of DRAT, the officers of the respondent

Bank filed an affidavit stating that the records were thoroughly checked and that there are no foreign bills which were submitted by the petitioners and not forwarded/processed by the respondent for negotiation or collection.

8. The DRAT by its impugned order dated 15.09.2014 on this contention of the petitioner regarding submission of foreign bills noted that the affidavit filed by the respondent Bank states that no such foreign bills are available. It also noted that the bills, copies of which are sought, are facts which are within the exclusive knowledge of the petitioners as it is the case of the petitioners that they have delivered these bills to the respondent. In view of Section 106 of the Indian Evidence Act, being a fact especially within the knowledge of the petitioners, the burden of proving that fact was on the petitioners. It also noted that the petitioners have not produced a single document to show that any such bills were submitted and not negotiated by the respondent. The DRAT also noted the contentions of the petitioners that their records got destroyed in a fire. It noted that this alleged incident does not discharge the petitioners of the burden to prove their averments. Hence, DRAT did not accept the said contention of the petitioners and held that the said submission or alleged loss claimed by the petitioners does not discharge the liability of the petitioner in any manner. The petitioners are aggrieved by this finding of the impugned order.

9. The second leg of the argument of the petitioners is regarding the right to cross-examine the officers of the respondent. Before DRAT, the petitioners filed two applications, one to permit them to cross-examine two of the officers of the respondent Bank since they had filed an affidavit stating that the Branch was open on Sunday i.e. 02.12.2001. By the second application, the petitioners sought a direction to the respondent to place on

record what business had been performed on 02.12.2001 and which other staff/officers had attended the office on that date. In the course of the arguments before DRAT, the petitioners had challenged the execution of the confirmation of balance as it is dated 02.12.2001 which happens to be a Sunday. DRAT had called upon the respondent to swear an affidavit if the date 02.12.2001 is the date on which the document was executed that being a Sunday. The respondent had placed on record the necessary affidavit.

10. On the application of the petitioner for cross examination of the deponent of the affidavit, the DRAT took the view that the affidavit has been filed by the respondent as the Tribunal had sought a response from the Bank. This being only a response to a query cannot be termed to be additional evidence inasmuch as neither of the parties had sought an opportunity to lead additional evidence. It also noted that the issue about execution of the said document on Sunday was raised for the first time before the Appellate Tribunal. It hence declined the request of the petitioners to cross-examine the deponents of the affidavit. On the second application filed by the petitioner seeking a disclosure about the persons who came to work on 02.12.2001 to the Bank and the nature of the work done by them, this application was rejected as it was held to be fishing enquiry. The petitioners are also aggrieved by this direction recorded by the DRAT in the impugned order.

11. We have heard the learned counsel for the parties.

12. Learned counsel for the petitioners has reiterated submissions of the petitioners vehemently. He has reiterated that the Bank has filed an affidavit dated 04.10.2013 of the Chief Manager deposing that the Branch was open on Sunday i.e. 02.12.2001 and the petitioners had signed the balance confirmation letter on the said date. Hence, it is urged relying upon the

judgment of the Supreme Court in the case of *Ayaaub Khan Noorkhan Pathan vs. State of Maharashtra*, AIR 2013 SC 58 that the petitioners ought to have been given a right to cross-examine the said Bank officers on the affidavit filed about the opening of the Branch on Sunday. It was urged that denial of the right of cross examination was contrary to the Principle of Natural Justice and vitiated the impugned order. As far as the second submission is concerned about the foreign bills, it was reiterated that law was ignored that if the Bank did not accept the bills from the petitioners as Benaras State Bank Ltd. was under a moratorium, the petitioners stand discharged.

13. The scope of interference with orders of inferior tribunals by the High Court in exercise of powers under Article 226 of the Constitution of India lies in a narrow compass. The Supreme Court in the case of *Bhiwani Central Cooperative bank Ltd., Haryana vs. Registrar Cooperative Societies Haryana &Anr.*, (2010) 15 SCC 517 held as follows:-

“6. It is too well-settled that in exercise of its power under Article 226 of the Constitution against the finding of an inferior Tribunal, the High Court would be justified in interfering with only if it comes to the conclusion that either the order of the Tribunal is contrary to some provisions of law; or the order of the Tribunal is based upon certain inadmissible evidence; or the Tribunal does not allow certain admissible evidence to be led in; or the conclusion of the Tribunal is such which no reasonable man would arrive at.”

14. We may first deal with the first submission of the petitioners regarding denial of the right to cross-examine the officers who had filed an affidavit pursuant to the directions of DRAT. We may first see the legal position.

15. The Supreme Court in the case of *Union of India and Anr. vs. Delhi High Court Bar Association & Ors.*, (2002) 4 SCC 275 held as follows:

“23. In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order 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.”

16. Hence, the court held that there has to be a very good reason to hold that the affidavit in such a case would not be sufficient and the witness would require cross-examination.

17. Similarly, a Division Bench of this Court in the case of ***Shahid Balwa vs. The Directorate of Enforcement, 2013 (201) DLT 211*** held as follows:-

“The legal position that would follow is that normally if the credibility of a person who has testified or given some information is in doubt or if the version or the statement of the person who has testified is in dispute normally right to cross-examination would be inevitable. If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case.”

18. It may be noted that in the written statement filed by the petitioners before the DRT, the stand taken was that officials of Benaras State Bank have taken signatures on certain blank forms. It is further stated that it is not clear as to how the necessity arose for making of an acknowledgement on 2.12.2001 when the credit facility/loan was granted in June 2000. It was claimed that the letter of acknowledgement dated 2.12.2001 is fabricated. There are no averments that the said date 2.12.2001 was a Sunday.

19. The respondent bank had led the evidence of AW-1 Shri Rakesh Kumar Srivastava, Senior Manager AW-2 Shri C.L.Verma, Manager and AW-3 Shri Arora, Chief Manager, who had filed their affidavits by way of evidence before DRT. One of the issues framed before the DRT was whether

the application filed by the respondent bank is barred by limitation. At no stage, did the petitioners seek to cross-examine the said witness of the respondent bank despite having pleaded that the balance confirmation relied upon by the respondent Bank was fabricated. Merely because now at this stage some additional facts have been urged to support its said contentions and the appellate Tribunal sought certain clarifications from the respondent would not be a ground to permit the petitioner at this belated stage to commence cross-examination of some of the officials of the respondent bank.

20. In the light of the above facts and the stated legal position, in our opinion, the Tribunal has exercised its jurisdiction on this aspect in a proper manner and there are no reasons to interfere with the same.

21. We may come to the demand of the petitioners for the details of the export bills. It may be noted that in the written statement filed by the petitioners before DRT the plea taken was that the respondent bank has committed breach of contract by not forwarding export bills of the petitioner worth more than Rs.45 lacs which have to be adjusted towards the loan account and that on account of the failure of the respondent bank, the said bank cannot be allowed to take benefit of its own negligence. It was further stated in the written statement that when the respondent submitted export bills to the tune of Rs.55 lacs to the erstwhile Benaras State Bank, the bank told the petitioner to hold on as the bank was in moratorium and could not accept the bills or transact any business. Hence, it was contended that this non acceptance resulted in the cancellation of the export orders which caused monetary loss and spoiled relationships with the buyers. It is noteworthy that in the written statement there are no details whatsoever given about the so

called export bills submitted by the petitioners. Even the name of the companies on which the bills were drawn, their amounts or dates, etc. or any details are forthcoming. Only bald averments are made.

22. Under section 101 of the Indian Evidence Act, whoever desires any court to give a judgment as to any legal right or liability depending on existence of facts which he asserts, must prove those facts to exist. Similarly, under section 106 of the Indian Evidence Act when any fact is especially within the knowledge of any person the burden of proving such fact is upon him. Merely claiming that on account of a fire the records of the petitioners have been destroyed cannot permit the petitioners to wriggle out of the responsibility as stated under the Evidence Act. In fact even no details are forthcoming as to how and when the fire took place and as to whether the entire records were placed in that particular area.

Further, it may be noted that section 65 of the Evidence Act permits filing of secondary evidence. The petitioners claim the documents were destroyed or lost. The petitioners were hence free to lead secondary evidence. They have chosen not to attempt to do the same but have merely filed an application trying to shift the entire onus on the respondent to prove the foreign bills which according to the petitioners were returned unpaid or not encashed by the respondent bank. Clearly this attempt to shift the onus was not permissible.

23. In any case, the Assistant General Manager of the respondent has already filed an affidavit clarifying that no such foreign bills which were submitted by the petitioner which were not forwarded or processed by the Bank for negotiation or collection are there. In view of the said affidavit and the fact that the petitioners have failed to place on record any plausible facts

to support their contentions, no relief can be given to the petitioners based on this contention. In our opinion, the DRAT has rightly rejected the said contention of the petitioners.

24. We may also note the conduct of the petitioner. This court in its earlier order dated 17.2.2016 had noted that the petitioners had sold the property to one Renu Tyagi who had moved an application for impleadment in the writ petition. The sale was made without telling her that the property was mortgaged with the respondent bank. This court adjourned the matter on that date holding that the court will hear arguments as to whether the petitioner should be heard in writ jurisdiction on account of their conduct disentitling them to be heard since the mortgaged assets have been sold by the petitioner to a third party falsely representing in the sale deed that the property sold is free from encumbrance. The petitioner before us has not made any submission denying the sale of the mortgaged property. Hence, even otherwise, given the conduct of the petitioner in our opinion the petitioner would not be entitled to any relief from this court.

25. In our opinion, there is no merit in the present petition. The petitioners have failed to show that the order of the Tribunal causes any injustice or that the Tribunal has exercised its power in an erroneous manner. The petition is dismissed.

(JAYANT NATH)
JUDGE

(INDIRA BANERJEE)
JUDGE

FEBRUARY 03, 2017/rb