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

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Decided on: 09.04.2018

+ W.P.(C) 674/2017
STATE BANK OF INDIA
Through:Petitioner
Mr. Sanjiv Kakra and Mr. Bheem
Sain Jain, Advocates.

versus

SATISH KUMAR MITTALRespondent
Through: Mr. Krishna Kumar and Ms.
Srujana Suman Mund, Advocates.

And

+ W.P.(C) 675/2017
STATE BANK OF INDIA
Through:Petitioner
Mr. Sanjiv Kakra and Mr. Bheem
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versus

SATISH KUMAR MITTALRespondent
Through: Mr. Krishna Kumar and Ms.
Srujana Suman Mund, Advocates.

And

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STATE BANK OF INDIA
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SATISH KUMAR MITTALRespondent
Through: Mr. Krishna Kumar and Ms.
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STATE BANK OF INDIAPetitioner
Through: Mr. Sanjiv Kakra and Mr. Bheem
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versus
SATISH KUMAR MITTAL & Ors.Respondent
Through: Mr. Krishna Kumar and Ms.
Srujana Suman Mund, Advocates.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MS. JUSTICE DEEPA SHARMA

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1. In all these writ petitions, the petitioner/Bank has challenged the common order dated 11.02.2015 of Debt Recovery Appellate Tribunal, New Delhi (hereinafter referred to as "DRAT") in Miscellaneous Appeal No. 492/2013 in TA No. 02/2003, Appeal No. 493/2013 in T.A. No. 12/2002, Appeal No. 494/2013 in T.A. No. 7/2002 and Appeal No. 495/2013 in T.A. No. 8/2002.

2. The brief facts essential for disposal of these writ petitions are as under:-

The petitioner/Bank (hereinafter referred as Bank) filed a suit for recovery of sum of Rs. 15,49,791.81/- against Mr. S.K. Mittal and others namely, M/s Indo Travel Services Pvt. Ltd., Lamba Foreign

Travels Pvt. Ltd, Sh. B.M. Lamba, Sh. M.M. Lamba, Smt. Savitri Lamba before this Court in the year 1985. The respondent No. 1 Sh. S.K. Mittal (hereinafter referred as Sh. S.K. Mittal) who had three fixed deposits with the Bank and the amount due in those fixed deposits was adjusted by the bank towards the dues of borrower, also filed three suits against the Bank, claiming payment of the amounts due on his Fixed Deposit receipts. All these four suits were transferred to DRT by this Court in earlier proceedings, with directions to consider the three suits filed by Sh. S.K. Mittal as counter claims to the suit filed by the Bank.

3. Pursuant to these directions, the four suits, although given different T.As were tried jointly. The evidences recorded in one case were ordered to be treated as evidences in all the remaining cases.

4. The case of the Bank in its suit, in short, was that the Bank had furnished a bank guarantee for a sum of Rs. 16.59 lakhs in favour of M/s Indo Travel Service Pvt. Ltd for the benefit of International Air Transport Association (IATA) and against the said bank guarantee, M/s Indo Travels Service Pvt. Ltd (borrower) and Lamba Foreign Travel Pvt. Ltd. and Sh. S.K. Mittal executed a counter- guarantee

deed dated 03.02.1984 thereby undertaking to pay on demand any amount which the Bank may call upon the borrower to pay.

5. Sh. B.M. Lamba, Sh. M.M Lamba and Smt. Savitri Lamba also deposited the title deeds of their immovable properties creating equitable mortgage as security for the due payment of the amount. On 30.11.1984, the bank guarantee was invoked and the bank paid a sum of Rs. 16.59 lakhs to IATA. The petitioner/Bank demanded the amount from the borrower and guarantors, M/s Indo Travels Service Pvt. Ltd, Lamba Foreign Travels Pvt. Ltd. and Sh. S.K. Mittal. On their failure to make payment, notices dated 01.12.1984 and 07.12.1984 were issued in their names, demanding the payment with interest @ 18% per annum w.e.f. 30.11.1984 till the date of payment. The borrower company had kept 10% as margin money with respect of the said bank guarantee and this amount was adjusted along with the interest accrued thereon. Since Sh. S.K. Mittal was having certain term deposits and Fixed Deposits with the petitioner/Bank, they were adjusted towards the amount due and payable by the borrower/ M/s Indo Travel Services Pvt. Ltd. After that adjustment, a claim of Rs. 1,29,114.50 remained and accordingly, the suit for recovery was filed.

6. This suit was contested by Sh. S.K. Mittal. In the written statement, his contention was that he had never stood a guarantor for the liability of the borrower and hence there was no cause of action against him. He had taken up the plea that he had signed the counter guarantee document dated 03.02.1984 as a witness and not as a guarantor. He had alleged that since he never stood as a guarantor, there was no lien on the fixed deposit which he had with the Bank and the Bank had wrongly adjusted the amount of his fixed deposits against the amount due towards the borrower.

7. Following issues were framed on the plea of Sh. S.K. Mittal:-

“1. Whether Sh. S.K. Mittal (D3 in TA 12/2002) is a guarantor to the bank guarantee?”

2. Whether the bank could exercise the general lien on the FDRs of Sh. S.K. Mittal available with the bank?”

3. Whether the bank is justified in adjusting the FDRs of Sh. S.K. Mittal towards the liability in the bank guarantee of M/s Indo Travel Services Pvt. Ltd.?”

8. On these issues the parties had led their evidences and duly cross-examined the witnesses.

9. After considering all the evidences on record, DRT-II gave the following findings of the facts on the issue whether Sh. S.K. Mittal

stood as a guarantor to the counter guarantee or was a witness of this document. The relevant paragraph is reproduced as under:-

“20.....The execution of the counter guarantee is denied by defendant No.3. It is also denied that D3 had approached the bank to provide guarantee for defendant No.1. Defendant No.1 is a private limited company. There is nothing on record to show that D3 had any connection with the D1 company. The counsel for D3 has submitted that D3 had signed as witness to the counter guarantee, but the typing ‘witness’ was struck off to make it appear that D3 has also signed as a party to the counter guarantee. Thereafter, the ‘witness’ was added in writing and Mr. J. Sahai, Branch Manager had put his signature as a witness. It is, therefore, clear that striking was done after the document was prepared because if Mr. Sahai was to be a witness, the word ‘witness’ would have also been entered in the documents by typing Sh. Sahai was cross examined on this point. Sh. Sahai answered that before issuing a bank guarantee, the bank used to obtain a request from the customer. But in this case, no such request was received and Mr. Sahai had answered that it is not compulsory to move an application. He also added that when the bank issues a bank guarantee, the bank obtains a counter guarantee from the same applicant. The bank did not mention in the original application that the bank guarantee was issued on the request of Sh. S.K. Mittal. In Para 3 of the plaint, the applicant has stated that sometime in January 1984, the defendant No.1 approached the plaintiff and requested the plaintiff to furnish a bank guarantee. But in Para 4,

it is stated that on the request of all the defendants, the plaintiff gave a bank guarantee. PW1, Mr. Sahai, was cross examined on this point and he has stated that he cannot explain the fact why the bank did not state in the plain that on the request of Sh. S.K. Mittal, the bank issued the guarantee. PW1 was asked what is the procedure in banking practice if material alteration is made in banking document? The witness answered that according to the banking norms, the document is returned to the executants with the directions to bring any other fresh comment, but in this case, at the request of Mr. S.K. Mittal, "I did not ask him to bring a fresh document." The witness was asked why he did not get the scoring of the word 'witness' counter signed by Mr. S.K. Mittal. The answer is that "Mr. D.M. Lamba did not bring the seal and rubber stamp, therefore, the initial of both of them were not obtained at the place of scoring. On going through the testimony of PW1 Mr. Sahai and considering the document, the counter guarantee coupled with the copy of the counter guarantee produced by the which does not bear scoring of the word 'witness', I am of the opinion that the word 'witness' was scored subsequently after execution of the document as witnesses. Therefore, the conclusion is that defendant No.3 had signed only as a witness and subsequently the word 'witness' was scored. Ordinarily, the witness would be an independent person. The Manager of State Bank of India is the person to whom the document is delivered and he could not have been an effective witness. Defendant No.3 is not a person connected with M/s Indo Travel Services Pvt. Ltd. The bank made an attempt to establish that D3 had a stake on Indo Travel Services Pvt. Ltd. as D3 had decided to

take over the company. But there is nothing on record to establish that defendant No.3 had any connecting whatsoever with Indo Travel Services Pvt. Ltd. A private limited company is having a separate legal entity. On behalf of M/s Indo Travel Services, Mr. Rajindra Bhanot, Managing Director had signed the counter guarantee. If the other two persons were also to sign as guarantor, that should have been mentioned as parties 1, 2 and 3. Ordinarily, when a document is prepared, when there are three executants, they will be shown number wise just below one by one, but in this case, it is clear that Sh. Rajindra Bhanot was to sign as an executants and thereafter, the other two persons had to sign as witnesses. It is clear that the word 'witness' was scored subsequently. The scoring subsequently. The scoring is not authenticated by the executants. Therefore, I find that defendant No.3 and Managing Director of Lamba Foreign Travels Pvt. Ltd. did not sign the counter guarantee as an executant, but they had signed only as witness. Therefore, defendant No.3 did not sign the counter guarantee as an executant, but he had signed only as a witness. Therefore, defendant No.3 was not a guarantor to the guarantee offered by State Bank of India.

10. The order of DRT *qua* the findings relating to Sh. S.K. Mittal were challenged by the Bank before DRAT. Their contention was that Sh S.K. Mittal was a guarantor in the counter guarantee deed dated 03.02.1984 and not a witness. The adjustment of fixed deposit receipts against the payments payable by borrower was permissible

under the law. The DRAT has recorded the contentions of the petitioner/Bank as under:-

“ The counsel for the bank has challenged the order passed by the Tribunal below primarily on two counts. The counsel would first submit that the Tribunal below did not appreciate the facts and the material on record while concluding that respondent No. 1 had no connection with M/s Indo Travel Service Pvt. Ltd. He would next contend that the Tribunal was also not justified in concluding that respondent No. 1 had signed the guarantee deed as witness and not as a guarantor to offer counter guarantee.”

11. After considering the evidences relied upon in their arguments by the petitioner/Bank, the learned DRAT dismissed the appeal of the petitioner/Bank and thereby upheld the order passed by DRT-II. On the issue whether the Bank could have exercised the general lien on the fixed deposit receipts of Sh. S.K. Mittal and whether the bank is justified in adjusting the amounts of those fixed deposits receipts towards the liability in the bank guarantee of borrower, the DRAT has observed as under:-

“25.The defendant has produced all the original term deposit receipts and FDRs before this Tribunal. There was no endorsement in any of these receipts to show that a lien was marked on these receipts. The State Bank of India has not produced any documents to show that the depositor had deposited the original term deposit receipts with State Bank of India as collateral

security in respect of the bank guarantee provided to D1. The witness, Mr. J. Sahai was asked on the procedure for marking a lien over the FDR of a customer. The witness answered that an entry is made in the FDR Register marking the lien to the effect that such FDR was having lien in respect of the bank guarantee. He also stated that in some cases, the FDR, after marking lien, would be deposited with the bank, but in this case, it was not done. He also stated that the bank did not issue any letter to Mr. S.K. Mittal stating that his FDR's were treated as security in the bank guarantee facility provided to D1. The witness added that Mr. S.K. Mittal had made only verbal request for marking lien over the FDRs. This verbal request is spoken to by PW 1, but that is denied on oath by Mr. S.K. Mittal. Therefore, we have oath against oath on this fact and the bank witness cannot be relied upon when it is denied on oath by defendant No. 3.

26.....It is not that the bank can mark a lien to any debt. The bank, in this case, has failed to establish that D3 Sh. S.K. Mittal had given his consent or that there was any agreement with Sh. S.K. Mittal and the bank that the FDRs of Mr. S.K. Mittal could be adjusted towards the dues of defendant No. 1 in the bank guarantee facility provided by the applicant bank. The original receipts, FDRs/Term Deposit Receipts were always in possession and custody of Mr. S.K. Mitta. The bank has failed to establish that at any point of time, he was informed that the lien was marked on the FDRs. The bank could not have marked a lien for the amount due by D1 since Mr. S.K. Mittal was not connected with the credit facility of bank guarantee enjoyed by D1. Therefore, the bank could not have exercised the general lien on the FDRs/Term Deposits and the bank was not justified in adjusting the FDs of Mr. S.K. Mittal towards the liability of the bank guarantee of M/s Indo Travel Services Pvt. Ltd. Point

No. 2 and 3 are answered against the bank and in favour of Mr. S.K. Mittal.”

12. This order of DRAT is impugned before us by the Bank in these writ petitions. The grounds taken is that the DRT and DRAT have faulted in findings of the facts that Sh. S.K. Mittal had no connection with the borrower/M/s Indo Travel Services Pvt. Ltd. on whose behalf the counter guarantee was executed. It is contended that the evidence of Sh. J. Sahai, Sh. Charanjeet Singh and Smt. Renu Challu indubitably and abundantly establishes on record that Sh. S.K. Mittal had ample interest in Borrower Company.

13. It is further contended that the fact that the family members of Sh. S.K. Mittal hold about 2000 equity shares out of total 7,440 equity shares in the borrower company/ M/s Indo Travel Services Pvt. Ltd, was proved by Sh. J. Sahai, DW-1, who has produced on record the shareholding pattern as Ex. D-3C but this fact is not properly appreciated.

14. It is further contended that Tribunal was wrong in not appreciating the fact that Sh. S.K. Mittal had signed the document as a guarantor and since he had signed at the wrong place, the typed

word 'witness' had to be cancelled and the person who appeared as a witness to this document thereafter signed it. This alteration in the document was done in front and with the consent of all the parties and there was a complete meeting of the minds. These facts are proved by DW-1, Mr. J. Sahai in his evidence. It is further contended that these facts also finds support from the document itself which contains the expression "We", which conclusively shows that Sh. S.K. Mittal had signed the document as a guarantor and not as a witness. The Tribunal has wrongly appreciated this fact. Also, the findings of Tribunals are self contradictory. On one hand, the Tribunals have held that there was no relationship between Lamba Foreign Travels Pvt. Ltd and M/s Indo Travel Services Pvt. Ltd (borrower) and they were complete strangers; if they were complete strangers then why would Sh. S.K. Mittal have witnessed the counter guarantee deed. It is contended that the Tribunals have interpreted the evidences on record wrongly and have given wrong findings of fact which are contrary to the materials on record. That the Bank have lien over the fixed deposits and can adjust the said fixed deposits amount towards outstanding dues. Reliance is placed on Syndicate Bank vs. Vijay Kumar [(1992) 2

SCC 330J. Relying on these contentions, it is prayed that the impugned order be set aside.

15. We have heard the arguments of learned counsels of the parties and have perused the record.

16. It is argued by learned counsel for the petitioner/Bank that the findings of learned DRT and learned DRAT to the effect that Sh. S.K. Mittal had not signed the counter guarantee deed dated 03.02.1984 as a guarantor is a faulty finding of fact. It is argued that these findings are based on surmises and conjectures and not based on any evidences.

17. It is pertinent to note that similar contentions were also raised by the petitioner/Bank in its appeal before learned DRAT. Learned DRAT has also, after considering the evidences on record as well as arguments and contentions, held as under:-

“To further support his plea, the counsel has referred to the cross- examination of respondent No. 1, wherein he has admitted that the persons listed on 12 and 16 of Ex. D-3C were related to him. This piece of evidence cannot be read in isolation. The respondent No. 1 had otherwise denied the suggestion as incorrect when asked that he had told the bank official that his relatives were having substantial interest in M/s Indo Travel

Service Pvt Ltd. or that he was going to take over the same. He also denied the suggestion that he was involved in financial and business transactions of M/s Indo Travel Service Pvt. Ltd. This evidence or line of submission as pursued by the counsel for the appellant will be of not much help to the appellant. Even if it is conceded that some relatives of respondent No. 1 were having shares in M/s Indo Travel Service Pvt. Ltd., that in itself cannot lead to holding him liable in his individual capacity or in the capacity as separate entity. In order to succeed, the appellant was required to lead some trustworthy evidence and cannot expect to succeed on the basis of some facts coming on record from here or there.

The bank has not been able to prove that respondent No. 1 had signed the document to offer a counter-guarantee and, therefore, the finding returned by the Tribunal below in this regard would not call for any interference on this ground.'

18. The relevant paragraphs concerning the findings of the fact on the issue whether Sh. S.K. Mittal had signed the counter guarantee deed dated 03.02.1984 as a witness or as a guarantor are reproduced as under:-

“ I have considered this submission and has deeply analysed the documents to appreciate the submissions made before me by the respective counsel. If the bank had obtained the signatures on these documents as guarantors, they could have been easily and conveniently asked to endorse their signature in the space under the signature of Mr. Rajinder Bhanot on the right hand side of the last page. If the respondent No. 1 was to sign as guarantor the bank could have easily asked him to sign as such and thus could have avoided his signing in column meant for signature of

witness. Once the bank had allowed or has obtained the signature of respondent No. 1 in the column of 'witness' which word is not obliterated it was for the bank to remove this doubt emerging from the document. In order to avoid this situation, the bank could have easily got the 'obliteration' authenticated by obtaining the signature or initials of the respondent No.1 on the obliterated portion. The bank can be expected to act with diligence while obtaining documents from the clients. The plea therefore that the Respondent No. 1 had signed as witness is possible and/or plausible. The bank has not been able to prove its assertion that respondent No. 1 had signed as guarantor.

Thus, the conclusion which the Tribunal has drawn is not only plausible but even possible. The counsel for the bank could not show any record or otherwise has no satisfactory plea to counter this conclusion which is possible and plausible. It may call for notice here that the Bank manager had endorsed his signature as witness below the signature endorsed by respondent No. 1 on left hand side which also is an indication that the column on the left side was meant by getting signatures of witnesses. The preponderance of probability in this case would show that respondent No. 1 had endorsed his signature on this counter-guarantee as witness. Respondent No. 1 thus could not be taken as signatory to this counter-guarantee. The bank has not been able to discharge the burden resting on it to prove this assertion that respondent No. 1 was guarantor. That, in my view, would be sufficient to discharge respondent No. 1 of the liability."

19. It therefore is clear that there are concurrent findings of fact by the Tribunals below on the issue whether S. S.K. Mittal had signed the counter guarantee dated 03.02.1984 as a witness or as a guarantor.

20. In writ petitions of this nature, the power of the Courts are very limited. In **Hero Vinoth (minor) vs. Seshammal**, AIR 2006 SC 2234, the Supreme Court has held as under:-

“25. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) xxx xxx xxxxxxx

(ii) xxx xxx xxx

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;

(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

21. Further in **Laxmiddevamma vs. Ranganath**, (2015) 4 SCC 264,

Supreme Court has held as under:-

“15. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe

that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained. ”

22. In a recent case titled as **Parminder Singh vs. Gurpreet Singh,** AIR 2017 SC 3601, the Supreme Court has again reiterated the law that the Courts shall not interfere into the concurrent findings of the facts. The court observed as under:-

“13. Here is a case where all the three Courts, namely, Trial Court, first Appellate Court and the High Court concurrently held in favour of the Respondent (plaintiff) and accordingly decreed his civil suit. In other words, all the three Courts, on appreciating the evidence in their respective jurisdiction and discretion, held that the defense taken by the Appellant (Defendant) was not proved. On the other hand, it was held that the Respondent was able to prove that the agreement was real, bona fide and genuine and was thus capable of enforcement. Indeed, we find that the Courts below recorded this categorical finding of fact saying that the genuineness of the agreement was even admitted by the Defendant's witnesses. The Courts below also recorded a finding that the Respondent was ready and willing to perform his part of the agreement and, in fact, performed his part of the agreement whereas the Appellant

failed to perform his part of the agreement and thereby committed its breach.”

23. These principles were again reiterated by the Supreme Court in its recent judgment titled as **Suresh Kumar vs. Anil Kakaria and Ors,** AIR 2017 SC 5239. and in the case of **Nagar Palika vs. Rameshwar Lal and Ors,** AIR 2017 SC 5094, the Supreme Court has held that “*When two Courts, namely, First Appellate Court and the High Court found no merit in the appeal and confirmed the findings of fact then, in our opinion, such concurrent findings are binding on this Court.*”

24. It is also a settled proposition of law that where there are two possible views on a proved fact, the concurrent view taken by the Courts below, if a plausible view should not be interfered with unless the same is perverse or against the canons of justice or against the law or is a biased view.

25. As noted above, there is a concurrent finding of the fact of the DRT and DRAT that Sh. S.K. Mittal had signed the document as a witness and not as a guarantor. The learned counsel for the petitioners has failed to bring to our notice any material which could show that the finding is perverse or is based on no evidence. We find no reason

to interfere with the findings of the facts that Sh. S.K. Mittal had not signed the counter guarantee deed as a guarantor. As he did not sign the document as a guarantor, no liability can be attached to him towards the dues against the borrower company who had failed to return the money to the petitioners. The act of the Bank to adjust the borrower's amount against the Fixed Deposits in the name of Mr. S.K. Mittal was unjust and the petitioners are liable to refund the money.

26. We find no legal or factual infirmity in the impugned order. The petitions have no merit and the same are dismissed with no order as to costs.

**DEEPA SHARMA
(JUDGE)**

**SIDDHARTH MRIDUL
(JUDGE)**

APRIL 09, 2018

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