IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.01.2020

DELIVERED ON : 13.01.2020

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

C.R.P.No.143 of 2016
and CMP.No.710 of 2016

Andhra Bank,
Sowcarpet Branch,
No.40, Annapillai Street,
Sowcarpet, Chennai. ... Petitioner

Vs.

1.M/s.Bhagya Nagar Solvent Extractions Pvt. Ltd.,
No.51 (Old No.21)
Moosa Street, T.Nagar, Chennai-600 017.

2.R.Ramanathan
Proprietor,
M/s.Ramanathan Bio-Fuels,
9, State Bank Officers Colony,
Shastri Nagar, Adyar, Chennai-600 020.

3.M/s.Akhila Priya Hotels and Resorts Pvt. Ltd.
24/2, Sadula Street,
T.Nagar, Chennai-600 017.

4.M/s.Sri Fabrications,
21/4, Madurai Veeran Koil Street,
T.Nagar, Chennai-600 017.

5.M/s.Conveytech Plants and Equipments Pvt. Ltd.,
No.33 (Old No.10A/2),
Jagannathan Colony, Off.Foxen Street,
Perambur, Chennai-600 011.

6.M/s.Mandovi Fibres Ltd.,
No.15, Giri Street,
West Mambalam, Chennai.

7.M/s.R.K. Constructions,
B8, 57, Mothilal Street,
T.Nagar, Chennai-600 017. ... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 21.08.2015 passed in R.A.(O.A)No.21 of 2012 on the file of the Debts Recovery Appellate Tribunal at Chennai.

For Petitioner : Mr.R.Gowthama Narayanan

For Respondents: Mr.K.Suresh Kumar for R1
Mr.Omprakash, Senior Counsel,
assisted by
Mr.P.Muthukumarasway for R2

O R D E R

M.SATHYANARAYANAN, J.

The revision petitioner, namely Andhra Branch, Sowcarpet Branch, Chennai, was the original applicant in O.A.No.145 of 2009 on the file of the Debts Recovery Tribunal-II, Chennai [in short 'DRT'].

2. The revision petitioner/original applicant filed the said original application against the defendants 1 and 2 / respondents 1 and 2 herein, praying for recovery of a sum of Rs.1,46,66,302.00 along with interest @ 16% p.a. calculated at monthly rest, from the date of the application i.e., September, 2009 till the date of payment and for sale of immovable Schedule Mentioned Property, namely Flat No.A001, Ground Floor, Kesav Dugar Apartment, Door No.1, East Avenue, Kattabomman Street, Keasavaperumal Puram, Raja Annamalai Puram, Chennai-600 028 and if the sale proceeds are insufficient, prayed for ordering recovery of balance amount after adjustment from the first defendant.

3. The said original application, after contest, came to be dismissed by the DRT, vide order dated 23.01.2012. The applicant/bank aggrieved by the same, filed an appeal in R.A.No.21/2012 on the file of the Debt Recovery Appellate Tribunal at Chennai [in short 'DRAT']. DRAT, vide order dated 21.08.2015, has dismissed the said appeal and thereby, confirmed the order of dismissal passed in the original application and challenging the legality of the impugned order passed by the DRAT, the present Civil Revision Petition is filed by invoking Article 227 of the Constitution of India.

4. Facts leading to the filing of this revision petition, briefly narrated and relevant for the disposal are as follows:

4.1. The first respondent was a customer of the applicant/revision petitioner/bank, operating Current Account in C.A.No.4819 and the respondents 2 to 7 had opened Current Accounts with them, representing themselves as vendors/suppliers/contractors of the first respondent company. Current Accounts were opened in the name of 11 concerns and they also approached the petitioner for credit facilities in the nature of Secured Overdraft (SOD) for the purpose of executing the orders issued by the first respondent company. The petitioner/bank favourably considered their applications and extended the SOD facilities for a limit of Rs.15,00,000/- to each of them and they also availed the same.

4.2. The second respondent is the proprietor of M/s.Ramanathan Bio Fuels, Chennai-600 020 and he also availed SOD facility for his business for a sum of Rs.15,00,000/- and towards repayment of the said facility, executed a Demand Promissory Note in favour of the petitioner/bank and also created Equitable Mortgage in respect of the above said immovable property on 23.12.2003. The second respondent also acknowledged the creation of Equitable Mortgage on 24.12.2003.

4.3. The petitioner further averred that the concerns, which include the respondents 2 to 7, who availed the Secured Overdraft facilities, have defaulted in repayment of the dues and all the accounts became irregular. The first respondent came forward and offered to settle all the above said 11 accounts and according to the petitioner, on enquiry, it came to know that borrowings were done in the name of 11 concerns for it's benefit. The first respondent also agreed that Equitable Mortgage created by the second respondent in respect of SOD facility of Rs.15,00,000/- given to him is to be extended and it shall be the security for all the amounts due and payable by 11 concerns.

4.4. The first respondent, in terms of the said arrangement, made payments and closed the following accounts, namely

i. M/s.R.Ramanathan Bio Fuels
ii. M/s.Vishnu Bio Fuels
iii. M/s.Suasa Project Infrastructure Development
iv. M/s.Kaluga Turbo Machinery Pvt. Ltd.
v. M/s.Medineeds
vi. M/s.Usha Kiran Constructions.

However, the first respondent did not pay the balance amount towards discharge of liabilities in respect of respondents 3 to 7 herein, namely

i. M/s.Akhila Priya Hotels and Resorts Pvt. Ltd.
ii. M/s.Sri Fabrications
iii. M/s.Conveytech Plants and Equipments Pvt. Ltd.
iv. M/s.Mandovi Fibres Ltd.
v. M/s.R.K.Consultants.

4.5. The petitioner further stated that on 09.10.2006, the first respondent came up with a proposal for One Time Settlement (OTS) and offered to pay a sum of Rs.55,00,000/- in full and final settlement of all the amounts due under the above said Secured Overdraft Accounts and after negotiation, it was agreed as follows and it is relevant to extract the same:

> (i) The 1st defendant shall pay a sum of Rs.55,00,000/- in full settlement of all the amounts due under the 5 SOD accounts.
>
> (ii) The mortgage created by the 2nd defendant on the property at Flat No.A001, Ground Floor, Kesav Dugar Apartment, Door No.1, East Avenue, Kattabomman Street, Kesavaperumal Puram, Raja Annamalai Puram, Chennai-600 028, shall continue to be treated as the security for the payment of all the amounts due under the 5 SOD accounts.

4.6. It is the case of the petitioner/bank that the first respondent did not honour the settlement as per the terms of the settlement and as such, it is liable to pay the dues under 5 SOD accounts which works out to Rs.1,46,66,302.00. The petitioner bank caused a legal notice dated 17.08.2009 to the first respondent and it was returned with an endorsement "left" and the second respondent did receive the notice and in respect of the notices sent to the respondents 3 to 7, they were returned with endorsements "left", "no such person/company" and "unclaimed" respectively.

4.7. The petitioner further averred that the first respondent acknowledged the debt and agreed to pay the said amounts and also undertook to pay the same, vide various correspondences. The petitioner/bank to recover the said amounts, has filed the said Original Application.

4.8. The first respondent filed a reply statement denying the averments and took a stand that they held some companies for closure of their loan liabilities and other than moral obligation, he is not legally liable to settle the loan dues of the respondents 3 to 7. The first respondent also denied the fact of having acknowledged any liability through his communications and categorically denied that it never came forward to settle the loan dues and prays for dismissal of the original application.

4.9. The second respondent has filed a detailed reply statement denying the averments and took a stand that he has never extended Equitable Mortgage in respect of the outstanding liabilities of respondents 3 to 7 and further pointed out that he filed W.P.No.18459 of 2009 on the file of this Court and the learned Single Judge of this Court has recorded the fact that the second respondent had availed overdraft facilities from the petitioner/bank to the tune of Rs.15,00,000/- and that the entire amount has been settled and therefore, while dismissing the writ petition, granted liberty to the second respondent as well as the writ petitioner to establish the grounds raised before the Debt Recovery Tribunal-II, Chennai where O.A.No.145 of 2009 are pending.

4.10. In sum and substance, it is the stand of the second respondent that admittedly, the dues have been discharged and in the absence of any specific undertaking as to the extension of Equitable Mortgage, so as to cover the liabilities of the respondents 3 to 7, the petitioner/bank has no cause of action against him and hence prays for dismissal of the original application.

4.11. The petitioner/bank has filed a proof affidavit, marking the documents Exs.A1 to A46. The first respondent has filed a counter proof affidavit.

4.12. The DRT, taking into consideration the averments made in the original application, reply statement and documentary evidence, had recorded a finding that no documentary evidence have been filed by the petitioner/bank to prove that the respondents 3 to 7 were vendors meant by the first respondent in Ex.A30 to invoke the Principle of Novation. The DRT had also taken note of catena of decisions and given a categorical finding that no evidence is available to prove that Tripartite Agreement came into being in substitution of the old contract and dismissed the original application, vide order dated 23.01.2012.

4.13. The petitioner/bank, aggrieved by the same, preferred an appeal in R.A.21 of 2012 on the file of the DRAT, Chennai. DRAT also concurred with the findings of the Tribunal that for an implied agreement of Novation, the conduct of the parties must be cogent and sufficiently clear and in the light of the fact that the first respondent never admitted that the respondents 2 to 7 are the beneficiaries in whose favour it has agreed to discharge the debt and the question of implied consent by conduct therefore does not arise and recording the said finding, dismissed the appeal, vide order dated 21.08.2015 and assailing the said order, the present Civil Revision Petition is filed.

5. Mr.R.Gowthama Narayanan, learned counsel appearing for the petitioner/bank would submit that the first respondent, under Ex.A16 dated 29.06.2004 has recorded the fact that about their commitments as to the closure of two SOD accounts i.e., M/s.Medineeds & M/s.Ramanathan Bio Fuels, servicing April 2004 interest in respect of the remaining 9 SODs and servicing May 2004 interest in respect of the aforesaid 9 SOD accounts on or before 10.07.2004. The first respondent, in the said communication, also undertook to close all the 9 SOD accounts in full i.e., @ 3 accounts per month commencing from July, 2004 on or before 30.09.2004 and as a token of their commitment, also enclosed respective Post Dated Cheques. The learned counsel appearing for the petitioner has also drawn the attention of this Court to Ex.A17 dated 02.08.2004 and Ex.A18 dated 13.08.2004 and would submit that as per the said communications, the first respondent had reiterated their commitments and made a request to the petitioner/bank to arrange for issue of a letter from Sowcarpet Branch stating that the title deeds held by the branch in respect of M/s.Ramanathan Bio Fuels would be released on payment of Rs.45 lakhs and for the balance remaining six accounts to be closed, agreed to offer Corporate Guarantee and also given their commitment to close it before the end of September, 2004.

6. The learned counsel appearing for the petitioner would further submit that those three documents is a substitution of the old contract and therefore, Novation took place under Section 62 of the Indian Contract Act, 1872 and the first respondent is bound to pay the dues as claimed in the original application for which it had extended the coverage of Equitable Mortgage created by the second respondent. In sum and substance, it is the submission of the learned counsel appearing for the petitioner that DRT as well as DRAT have not properly appreciated the facts, documentary evidence as well as legal plea and committed an grave error in dismissing the original application as well as the appeal and prays for interference.

7. Per contra, Mr.K.Suresh Kumar, learned counsel appearing for the first respondent has drawn the attention of this Court to Ex.A24, letter of the first respondent dated 03.03.2006 addressed to the petitioner/bank and would submit that in the said letter, they made a request to settle the SOD accounts by paying Rs.40,00,000/- towards full and final settlement and also requested for acceptance of the said proposal and it was

rejected by the petitioner/bank under Ex.A26 dated 12.04.2006 and under Ex.A28 dated 03.05.2006, the first respondent has given an offer for One Time Settlement of Rs.42,00,000/- and that was rejected under Ex.A30 dated 09.10.2006 by increasing the amount to Rs.55 Lakhs with a request to release the mortgage of the immovable property in favour of the second respondent. The learned counsel appearing for the first respondent has drawn the attention of this Court to Ex.B4 - letter of the petitioner/bank to the second respondent dated 15.06.2007 and would submit that the petitioner/bank has requested the first respondent to submit letter of compromise for release of title deeds for the purpose of referring the matter to higher authorities and in the absence of either a written substitution agreement or implied agreement, it is not open to the petitioner/bank to plead for Novation of Contract under Section 62 of the Indian Contract Act and the DRT as well as DRAT had properly appreciated the factual aspects as well as legal position to dismiss the original application and the appeal and since the findings are concurrent in nature, this Court, in exercise of it's jurisdiction under Article 227 of the Constitution of India, prays for dismissal of this Civil Revision Petition with exemplary costs.

8. Mr.Omprakash, learned Senior Counsel assisted by Mr.P.Muthukumarasamy, learned counsel appearing for the second respondent would submit that even as per the own admission of the petitioner/bank, the second respondent did execute Equitable Mortgage for SOD of Rs.15,00,000/- and it was also discharged and in the absence of any specific written undertaking extending the coverage of Equitable Mortgage in respect of SOD liabilities due and payable by the respondents 3 to 7, it is not open to the petitioner/bank to claim amounts from the second respondent and even otherwise, mere undertaking of the first respondent to extend the coverage of Equitable Mortgage created by the second respondent is of now use and it cannot be legally enforced also. The learned Senior Counsel appearing for the second respondent has drawn the attention of this Court to the decision in Jai Singh and Others v. Municipal Corporation of Delhi and another [(2010) 9 SCC 385] and would submit that this Court, in exercise of it's jurisdiction under Article 227 of the Constitution of India, may not act as an Appellate Court to re-appreciate the evidence of the Tribunals created under the Statute and the scope of judicial review is very limited and prays for dismissal of this Civil Revision Petition with exemplary costs.

9. This Court has carefully considered the rival submissions and also perused the entire materials placed before it.

10. The question arises for consideration is "Whether the plea of the petitioner/bank that Novation took place under Section 62 of the Indian Contract Act, 1872 is sustainable?"

11. In Benjamin Scarf v. Alfred George Jardine [(1882) 7 App.Cas 345], the issue relating go dissolution of partnership, liability of retiring partner and election to charge old or new firm came up for consideration and at Page 351 of the said judgment, the House of Lords had dealt with the term "Novation" and observed that "there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties ; the consideration mutually being the discharge of the old contract."

12. A perusal and consideration of the averments made in the original application, Exs.A16, A17, A24, A25, A26, A28, A30 and A31 would disclose that no novation took place for the following reasons. Moreover, there was no written undertaking or written communication of the second respondent extending the Equitable Mortgage created in respect of the immovable property towards security for repayment of the dues by the respondents 3 to 7.

13. DRT, after extracting Section 62 of the Indian Contract Act, 1872, has also considered a catena of decisions in K.Appukuttan Panicker and Anr. v. S.K.R.A.K.R. Athappa Chettiar and Ors [AIR 1966 Kerala 303], Canara Bank & Ors. v. City Bank N.A. & Ors. [(2004) 1 SCC 12], has recorded a finding to invoke the Principle of Novation under Section 62 of the Indian Contract Act, 1872 and there should be an agreement of parties to the new contract and the liability of the original contractor can be transferred only by Tripartite Agreement which will amount to Novation and further in para 12.21 observed that "At no stretch of imagination, an inference can be drawn from Exs.A16 to A28 and A30 to A33 to the effect that there was a Tripartite Agreement between the petitioner/bank, first respondent, second respondent and other respondents" and in the absence of any evidence to prove the Tripartite Agreement and substitution of old contract, the plea of Novation made by the petitioner/bank cannot be sustained and that was the main reason for the dismissal of the Original Application.

14. The Appellate Authority, namely DRAT concurred with the findings of the Tribunal/DRT and dismissed the appeal filed by the petitioner/bank and thus, it is a case of concurrent finding.

15. There are four essential requisites for Novation i.e., (1) a previous valid obligation, (2) the agreement of all the parties to the new contract, (3) the extinguishment of the old contract and (4) the validity of the new one.

16. It was held in Vishram Arjun v. Yerukula Shankariah [AIR 1951 AP 784] that "Novation is a substitution of the contract and not a mere variation of some of its terms. It should rescind or extinguish the previous contract. Whether an agreement entered into is in substitution of an old contract or not is always a question of fact depending also on the intention of the parties."

17. In Krishnaji Kunbi v. Tukaram Kunbi [AIR 1928 Nag 289], it was held that "a mere agreement between the parties to effect such a supersession or extinguishment at a future date cannot constitute novation."

18. The petitioner/bank in para 10 of the original application pleaded that on 09.10.2006, the first respondent came out with a proposal for One Time Settlement and offered to pay a sum of Rs.55,00,000/- in full settlement of all the amounts due under SODs and after negotiation, it was agreed and the details of which have been extracted in para 4.5 above.

19. A perusal and consideration of the above said exhibits would disclose that repeatedly the first respondent made offers to settle the dues by OTS and initially he made an offer of Rs.25,00,000/- and it was rejected and thereafter, it was increased to Rs.55,00,000/-. The first respondent also requested the petitioner/bank to discharge/release the property of the second respondent from Equitable Mortgage.

20. It is very relevant to extract the communication of the petitioner/bank to the first respondent dated 15.06.2007:

"Sowcarpet
0512/45/113
15/06/2007

The Managing Director,
The Bhagyanagar Solvent Extraction P. Ltd.
No.9, Flat No.202, 2nd Floor,
Manju Block, Chira Avenue,
Choolaimedu High Road, Chennai-600 094.

Dear Sir,

Sub: Your Compromise Offer for Settlement of Accounts
Rep: Your letter dated 09/10/2006 and 06/12/2006

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With reference to you above letter, my head office having confirmed that the request of the company to settle the above accounts under compromise for Rs.55 lachs (Rupees Fifty Five Lakhs only) may be considered without pre conditions. Regarding release of title deeds on payment of compromise amount, as CBI is investigating the case, the title deeds can be returned by CBI only. Hence we request you to submit a letter for compromise without any pre-condition for release of title deeds to refer the matter to our higher authorities."

A perusal of the contents of the said communication would disclose that the first respondent made an offer of Rs.55 Lakhs by way of OTS and also made a request to release the secured property of the second respondent and responding to the same, the petitioner/bank has stated that the said compromise of Rs.55 Lakhs may be considered without pre-conditions and regarding release of title deeds, CBI is investigating the case and it can be returned by CBI only and further made a request for release of title deeds for the purpose of referring the matter to higher authorities.

21. Thus, assuming that the OTS offer made by the first respondent is a substitution of the earlier/old contract, it was not accepted by the petitioner/bank for the reason that it contained a pre-condition and also made a request to the first respondent to submit a letter of compromise without any pre-condition for release of title deeds for referring the matter to higher authorities, but at no point of time, the petitioner/bank has accepted the offer made by the first respondent and therefore, there was no substitution of agreement or new contract between the petitioner and the first respondent. Even otherwise, there should have been Tripartite Agreement between the petitioner/bank on the one side and the respondents 1 to 7 on other side and admittedly, there was no Tripartite Agreement and as such, the plea of Novation taken by the petitioner has not been substantiated either factually or legally.

22. It is also to be noted at this juncture that even as per the averments made in the original application, the second respondent has created Equitable Mortgage in respect of SOD facilities from the petitioner/bank and no evidence has been produced to show that he has agreed to extend the coverage of Equitable Mortgage created for the SOD facilities of the respondents 3 to 7. The first respondent has no locus standi to extend the Equitable Mortgage created by the second respondent towards the overdraft facilities availed by the respondents 3 to 7. It is also an admitted fact that the dues of the second respondent has also been cleared and the said fact has also been

recorded by the learned Single Judge of this Court in the order dated 15.12.2009 made in W.P.No.18459 of 2009 [V.Ramanathan/second respondent herein v. The Senior Branch Manager, Andhra Branch, Sowcarpet Branch / petitioner and the first respondent herein] and the said fact is also not disputed by the learned counsel appearing for the petitioner.

23. It is also a well settled position of law that judicial review is not an appeal but a review of the matter, in which decision was made. [Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141(HL)].

24. It is also relevant to extract para 16 of the judgment in Jai Singh and Others v. Municipal Corporation of Delhi and another [(2010) 9 SCC 385]:

> "16. The High Court cannot lightly or liberally act as an appellate court and reappreciate the evidence. Generally, it can not substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi-judicial tribunals. The power to reappreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice."

25. The power of judicial review in respect of orders passed by Statutory Tribunals is limited and this Court, under the guise of judicial review, cannot re-appreciate the materials that were placed before the said forums and arrive at an altogether different conclusion, unless there is perversity attached to the said findings or the findings are based on no evidence.

26. In the considered opinion of the Court, no tenable grounds have been placed to persuade this Court to exercise the power of judicial review for the reason that DRT-II, Chennai as well as DRAT, Chennai had considered the factual aspects and legal position and rightly reached the conclusion that no evidence was made available to prove the fact of Tripartite Agreement between the parties herein for substitution of old contract and the documentary evidence produced by the petitioner/bank before the Tribunal would also reveal/disclose that repeated averments made by the first respondent for settlement of dues and also in the form of OTS, have not been accepted and in the absence of any new material as to the substitution of old contract in the form of new contract, the plea for novation taken by the petitioner cannot be accepted and

the materials placed on record before this Court did not probablise the case of the petitioner/original applicant.

27.This Court, on an independent application of mind and on careful appraisal and consideration of the entire materials and evidence, is of the considered view that there is no perversity or error apparent on the face of the record as to the reasons/findings rendered by the Tribunals below. The Civil Revision Petition lacks merit and deserves dismissal.

28. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

29. In the light of the dismissal of the Civil Revision Petition, the petitioner/bank is directed to discharge/cancel the Equitable Mortgage created by the second respondent and return the document of titles pertaining to immovable property at Flat No.A001, Ground Floor, Kesav Dugar Apartment, Door No.1, East Avenue, Kattabomman Street, Kesavaperumal Puram, Raja Annamalai Puram, Chennai-600 028 to the second respondent within a period of four weeks from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Chair Person,
Debt Recovery Appellate Tribunal,
Chennai.

2.The Branch Manager,
Andhra Bank,
Sowcarpet Branch, 40, Annapillai Street,
Sowcarpet, Chennai.

+2cc to Mr.P.Muthukumarasamy, Advocate Sr.2891

C.R.P.No.143 of 2016

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