(2014) 01 GAU CK 0044

Gauhati High Court

Case No: W.P. (C) No. 8769 of 2004

H. Achumi Steels (M/s.) and Another		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: Jan. 31, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226
- Evidence Act, 1872 - Section 34
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 19

Citation: (2014) 1 GLD 511 : (2014) 1 GLT 804

Hon'ble Judges: Biplab Kumar Sharma, J

Bench: Single Bench

Advocate: D.K. Mishra, Sr. Advocate and Mr. A. Dutta, Advocate for the Appellant; N.C. Das, Sr. Advocate and Mr. M.K. Mishra, Advocate for the Respondent

Judgement

Biplab Kumar Sharma, J.

This writ petition is directed against the judgment and order dated 6.2.2003 passed by the learned Debts Recovery Tribunal (DRT), Guwahati in Original Application (OA) No. 66/2000, affirmed by the Appellate Tribunal vide judgment and order dated 27.7.2004 in Appeal No. 74/2003. The DRT having allowed the O.A. No. 66/2000 filed by the respondent Bank granting certificate to recover an amount of lis. 33,33,841/- with interest thereon @ 9% per annum from the date of filing the OA till the actual payment, the petitioners filed the appeal before the Appellate Tribunal, which was registered and numbered as Appeal No. 74/2003. The said appeal having been dismissed by judgment and order dated 27.7.2004, they filed the instant writ petition on 15.10.2004 and by order dated 22.12.2004 the impugned judgment and order dated 6.2.2003 was stayed. After entertaining the writ petition by the aforesaid order dated 22.12.2004 with the stay order, the matter was not listed till 30.1.2008 except once on 31.1.2005. On both the occasions, the matter was

adjourned on the prayer of the learned counsel for the petitioners. Thereafter also on 14.7.2008, 22.7.2008 and 26.8.2008, the case was adjourned on the request of the learned counsel for the petitioners. When it was found that steps for service of notice on the respondent No. 4 was not taken, direction was issued for taking steps vide order dated 3.9.2008. Thereafter also vide order dated 17.6.2009, the matter was adjourned on the prayer of the learned counsel for the petitioner. When the matter was again taken up on 22.6.2009, the Court had issued notice upon hearing the learned counsel for the petitioner, although such notice was already issued on 22.12.2004, Thereafter, on 17.7.2009, the writ petition was admitted for hearing. When the matter was listed on 23.4.2012, 10.5.2012, 16.7.2012, 6.3.2013, 20.7.2013, 6.8.2013, 16.9.2013 and 7.11.2013, the matter was again adjourned on the request of the learned counsel for the petitioners. Finally the matter was heard on 7.1.2014.

2. The above development of the case has been referred to only to highlight the cause of delay in disposal of the writ petition. In the process, a stay has been operating on the decretal amount, which the respondent Bank was favoured with vide the impugned judgment and order. I hasten to add that this delay in disposal of the writ petition has nothing to do with the rights and contentions of the parties involved in this proceeding.

3. I have heard Mr. D.K. Mishra, learned Sr. Counsel, assisted by Mr. A. Dutta, learned counsel for the petitioner. Also heard Mr. N.C. Das, learned Sr. Counsel, assisted by Mr. M.K. Mishra, learned counsel for the respondent Bank. I have also gone through the entire materials on record including the records received from the Tribunal.

4. The petitioner No. 1 is a proprietorship concern and the petitioner No. 2 is its proprietor. On the basis of the application filed by the respondent Bank u/s 19 of the Recovery of Debts due to Banks and Financial Institution Act,. 1993 before the DRT, Guwahati for recovery of an amount of Rs. 33,33,841/-. The DRT having passed the aforesaid impugned judgment and order, the petitioners had preferred the appeal, which was also dismissed by the impugned judgment and order. The petitioners were the defendants No. 1 and 2 in the O.A. Upon appearance before the DRT, they filed written statement denying the claim of the Bank. In the O.A., it was contended that the Bank had sanctioned term loan of Rs. 25,00,000/- to the defendant No. 1 followed by sanction of Rs. 20.00,000/- as cash credit limit.

5. In the O.A., it was stated that the defendant No. 2 representing the defendant No. 1 had applied for a term loan and cash credit limit of Rs. 40,00,000/- for the purpose of plants and machineries to set up a project for the manufacturing of M/s. Ignots from scrap materials. Pursuant to the said application, the Bank had sanctioned term loan of Rs. 25,00,000/- incorporating the terms and conditions thereof. The term loan was secured by personal guarantee of the defendants No. 3 and 4 and also secured by the creation of registered mortgage of the land with building standing thereon as was described in the schedule to the plaint.

6. It was also pleaded that the Bank had also sanctioned Rs. 20,000/- as cash credit limit for the project, but the defendant No. 1 did not avail the same. In the plaint, the following documents were referred to as Ext.-A3 and A4.

i) An Agreement dated 13.6.97 incorporating terms and conditions of term loan of Rs. 25 lakhs (Ext.-A3)

ii) Letter of Hypothecation for complete plants and machineries (Ext.-A4)

7. In the plaint further statements made were as follows:

VII) That in consideration of the appellant having agreed to grant and/or granted the term loan to the defendant No. 1, the defendant No. 3 and 4 individually executed a letter of guarantee dated 13.6.97 (hereinafter referred to as "the letter of guarantee for the loan") in favour of the applicant guaranteeing the repayment of the dues under the loan agreement in terms of the letter of guarantee for the loan, in the event of default on the part of defendant No. 1 in repayment of any of the monies under the said loan agreement or in the event of any default on the part of the defendant No. 1 to comply with any of the formalities connected with the drawings of the loan, the defendant No. 3 and 4 solely and severally guaranteeing the repayment upto term loan and cash credit limit of Rs. 45 lakhs and also all monies which term shall include all interest due or to become due in respect of the said loan. (Ext.-A5 and A6).

VIII) That not only this, the defendant No. 2 created a registered mortgage over the land with building, structures etc. standing thereon as fully described and detailed in the schedule below vide registered deed No. 55/97 dated 26.5.97 (Ext.-A7)

IX) In pursuance of the execution of the documents as stated above and also in pursuance of creation of mortgage, guarantee and charge of the properties stated above, the applicant Bank allowed the defendant No. 2 to avail the aforesaid term loan facilities and the defendant No. 1 duly availed the said term loan facilities.

X) That all the transactions made by the defendant No. 1 including withdrawal of money, deposit of money, application of interest etc. are duly entered and recorded in the loan accounts maintained in the ledger of the applicant Bank in its ordinary and usual course of business.

XI) That the defendants however failed and/or neglected to repay even a single installment in the said account as per the terms of the sanction, followed by non-submission of stock as well as financial statements, non-deposit of outstanding dues and they failed and/or neglected to regularize the portion of the accounts inspite of repeated requests and reminders of the applicant.

XII) That the applicant Bank therefore sent registered A/D notice dated 17th June 2000 to all the defendants through their advocate requesting them to liquidate the outstanding dues within 10 days from the date of receipt of the said notice (Ext.-A11)

XIII) That the defendant made several assurances and commitments but they failed to adhere to several and mandatory terms and conditions and covenants on their part and due to such several and regular defaults, which cause occurrence of such sets of circumstances and apprehensions as according to the applicant Bank has endangered the repayment of amount of outstanding dues in the said account with interest, which has prompted the applicant to enforce different securities held by them so executed by the defendants.

XIV) That all the defendants are jointly and/or severally liable to pay the outstanding dues in the said term loan account with interest and other charges to the applicant Bank, which they have failed and/or neglected to pay inspite of repeated reminders, requests and approaches of the applicant Bank and consequently the total sum of Rs. 24,90,237/- as on March, 99 becomes payable and outstanding by the defendants as per the accounts maintained by the applicant Bank in its regular and ordinary course of their banking business (Ext.-A 15).

XV) The applicant Bank further begs to state. that they are also entitled to recover interest @ 19.75 percent per annum on the said amount with effect from April, 1999 to June, 2000 amounting to Rs. 8,43,604/-.

XVII) That the cause of action of the suit has arisen on and from 12.6.97 and on 14.6.97 being grant of term loan facilities on 16.5.97 being the date of creating of registered mortgage of landed properties and also on various and subsequent dated when the dues are not paid on due dates as per agreement and as such the suit is within the period of limitation and is not bared and any statues and law and the defendants are jointly and/or severally liable for the suit amount.

8. The reliefs prayed for in the plaint, inter alia, was for a certificate/order for a sum of Rs. 33,33,841/- as on 30.6.2000 and interest from 1.7.2000 till the date of realization at the contractual rate 19.75% per annum. Along with the plaint, the following documents were annexed:

1. Loan application dated 22.12.96.

2. Sanction letter dated 8.4.97

3. Agreement for term loan of Rs. 25 lakhs dated 13.6.97

4. Letter of Hypothecation of plants & machineries dated 13.6.97

5. Guarantee agreement of defendant No. 3.

6. Guarantee agreement of defendant No. 4.

7. Letter of defendant No. 1 dated 11.3.99

8. Copy of registered mortgage deed dated 26.5.97

9. Lawyer''s notice dated 17.6.2000

10. Statement of account.

11. Statement of account of unapplied interest.

9. Responding to the O.A., the respondents No. 1 and 2 had filed their written statement denying the contentions raised therein and inter alia raising the following pleas:

(12)...../.....The capital cost of the entire project was estimated to be about Rs. 94,00,000/- (Rupees Ninety four lakhs) only. Initially the defendant No. 2 requested the applicant Bank to finance 80% cost of the aforesaid project. However, the defendant No. 2 was advised by the applicant Bank that since the power of the Regional Manager of the Bank at Jorhat is limited to Rs. 50 lakhs only, therefore he should initially apply for financial assistance of Rs. 50 lakhs only and the same can be revived later on so as to meet the requirement of 80% cost of the project. Accordingly another project report was submitted by the defendant No. 2 on the under-standing that the cost of the project and required finance shall he revived at a later date. Thereafter the defendant No. 2 applied for a loan of Rs. 45 lakhs from the applicant Bank for the purpose of purchasing plant and machineries for the aforesaid project. The averment made in the application that the defendant No. 2 applied for a loan of Rs. 40 lakhs from the applicant Bank is not correct and hence denied by the answering defendants.

13. That with regard to the statements made in paragraphs 5 (iii), 5(iv), 5(vii) and 5 (viii) of the application the answering defendants state that the defendant N o. 2 applied for a loan of Rs. 45 lakhs from the applicant Bank and a sum of Rs. 25 lakhs was sanctioned as term loan. Thereafter 3 firms namely M/s. MODERN MACHINERY, M/s. VIKASH ELECTRICAL STORES and M/s. SIKHU DIESELS (SALES & SERVICE) submitted their quotations to the defendant No. 2''s form which in turn was forwarded to the Branch Manager of the applicant Bank. The answering defendants have also come to know that a total amount of Rs. 17,04,629/- was paid to the aforesaid three firms between 14.6.97 to 11.7.97 through direct correspondence by the applicant Bank. Further an amount of Rs. 5 lakhs (as margin money) was kept as Fixed deposits in two installments being F.D. No. 571 dtd. 13.6.97 and F.D. No. 5/21 dtd. 13.8.97. The answering defendants further state that an amount of Rs. 2.73 lakhs out of the sanctioned term loan amount was not disbursed by the applicant Bank. It be stated herein that the applicant Bank has intentionally suppressed the aforesaid facts in the application regarding disbursement of the amount made in favour of the aforesaid firms.

....

....

It is also stated that in the instant case although the aforesaid documents were executed by the answering defendants in order to avail the term loan amount, no

amount was, disbursed by the applicant Bank in favour of the answering defendants, as already stated herein above. Further the answering defendants was not permitted to avail the cash credit facilities amounting to Rs. 20 Lakhs. In that view of the matter, all the aforesaid documents are invalid in the eyes of law and the answering defendants are not liable to pay any amount to the applicant Bank.

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.....

14. That with regard to the statements made in paragraph 5(v) of the application the answering defendants state that although an amount of Rs. 20 lakhs was sanctioned by the applicant Bank as cash credit limit, the defendant No. 1 could not avail the said facilities. It is specifically denied by the answering defendants that the defendant No. 1 did not avail the cash credit facilities as alleged by the applicant Bank on the present paragraph under reply.

10. The O.A. was contested by the present petitioners only and their main contention was that they are not liable to repay the amount claimed by the respondent Bank. However, they admitted that they had approached the respondent Bank for term loan and cash credit limit. The defendants No. 3 and 4 did not contest the O.A, and thus the impugned proceeding was ex-parte against them. The learned Tribunal referring to the evidence on record, both oral and documentary found that there is no dispute that the defendant No. 2 i.e. the present petitioner No. 2 had approached the respondent Bank for the term loan and cash credit limit. Ext.-A2 is the sanctioning letter, which speaks about the terms and conditions of the loan and schedule of repayment with interest. Clause 13 of the sanctioning letter reads as follows:

Payment of term loan of Rs. 25.00 lakhs be made directly to the parry of supplying induction melting furnaces consist of solid state shell crucible after collecting difference amount of Rs. 14.90 lakhs from the entrepinary.

11. Clause 13(i) provides that no withdrawal would be allowed in C/C account. Admittedly, the defendant No. 2, after accepting the terms and conditions specified in Ext.-Al, executed the loan documents marked as Ext.-A3 and A4. Ext. A5 and A6 are the guarantee agreement executed by the defendant No. 3 and 4 binding themselves jointly and severally liable with the loanees. Ext.-A7 is the registered mortgage deed executed by the defendant No. 2.

12. There is no dispute that the contesting defendants obtained quotation from three different firms and submitted those quotations for payment to the respondent Bank in terms of the sanction letter. Thus the arguments advanced by the learned counsel for the petitioners that the respondent Bank had directly entered into contract with the private firms (supplier) cannot be accepted. It was the defendant No. 2, who obtained the quotations for supply of the required machineries and on

his approach, the respondent Bank disbursed the loan amount through banker cheque issued in the name of the firms.

13. The plea of non-supplying of machineries by the firms cannot be accepted as it was the borrower, who had entered into the contracts with the respondent Bank for direct payment of the amounts as per his acceptance of the quotations of the supplier. In such circumstances, the Bank having made the payment, the defendant No. 1 is bound by said action and is liable to repay the loan disbursed to it.

14. As has been recorded by the learned DRT, the defendant No. 2 had created a valid mortgage (Ext.-A7) as a security in favour of the respondent Bank. Much has been emphasized during the course of hearing of the writ petition that the statement of account (Ext. A15) is not admissible evidence. Such a plea is not acceptable simply because of the reason that the payment to the supplier selected by the defendant No. 2 to whom payments were made by the Bank amounted to disbursement of loan to the borrower. Admission of payment tallys with the figure reflected in the statement of account which is found to be certified in terms of Bankers'' book of Evidence Act.

15. Being aggrieved by the impugned judgment and order of the learned Tribunal, the petitioners had preferred the appeal mainly on the following grounds:

(B) For that the Hon''ble Tribunal has failed to take into consideration that the sanction letter dated 8.4.97 (Ext. A-2) is only a document prepared by the respondent Bank, copy of which was not served on the appellants- The said sanction letter not being an agreement between the appellants and the respondent Bank the appellants are not bound by the terms and conditions of the said sanction letter and the same cannot be the basis for fastening the liability on the appellants.

(C) For that the Hon''ble Tribunal has failed to consider that the terms of the agreement dated 13.6.97 (Ext. A-3) does not empower the respondent Bank to pay the loan amount sanctioned in favour of the appellants to any third party.

(D) For that the Hon''ble Tribunal has failed to appreciate that as per the term and conditions of the agreement dated 13.6.97 (Ext. A-3) the respondent Bank is bound to release the loan amount to the borrowers i.e. the appellants and the respondent Bank has no authority to override the terms and conditions of the said agreement.

(E) For that the Hon''ble Tribunal has committed gross illegality in allowing the application filed by the respondent Bank merely on the basis of the sanction letter dated 8.4.97 (Ext. A-2) without considering the agreement dated 13.6.97 (Ext. A-3) and without considering as to whether payment was actually made to the borrowers i.e. the appellants who were deprived of enjoying the benefit of the loan due to the fault of the respondent Bank of releasing the loan amount to third parties without putting any condition.

(G) For that the Hon''ble Tribunal committed gross illegality in holding that the borrowers i.e. the present appellants entered into a contract with the respondent Bank for direct payment of the amounts in view of their acceptance of the quotations of the suppliers inasmuch as there was no such contract between the appellants and the respondent Bank and mere submission of quotations from some supplier cannot be termed as contract with the respondent Bank for making direct payment to any third party.

(H) For that the Hon''ble Tribunal failed to appreciate the evidence of PW (Sri Nahiruddin Ahmed, Manager, Planning or the respondent Bank) to the effect that no document was submitted by the respondent Bank to show that the payments to the third parties were made by the respondent Bank on the advice of the appellants and no step was taken by them to get the machineries supplied by the parties to whom the loan amount was disbursed.

(I) For that the Hon''ble Tribunal failed to consider the provisions of Section 34 of the Evidence Act to the effect that the entries in the Books of Account are not alone sufficient evidence to charge any person with liability.

(J) For that the Hon''ble Tribunal failed to appreciate that in the instant case Ext. A-1 5 i.e. the Statement of Accounts having been prepared behind the back of the appellants and no confirmation letter having been obtained from the appellants by the respondent Bank as admitted by P.W. 1 (Sri Nahiruddin Ahmed, Manager, Planning of the applicant Bank) the Hon''ble Tribunal committed gross irregularities in fastening the liability on the appellants without any corroborative evidence to that effect.

(N) For that the Hon''ble Tribunal was predetermined to allow the application filed by the respondent Bank inasmuch as it was reluctant to follow the principles of Natural Justice in not initially allowing te(sic)h appellants to cross examine the P.W. 1 (Officer of the respondent Bank). Although the P.W. 1 was allowed to be cross examined by the Hon''ble High Court and the said witness although admitted that there was no confirmation letter from the appellants, the Hon''ble Tribunal refused to consider those vital facts in deciding the application.

16. The Appellate Tribunal vide its impugned judgment and order having affirmed the judgment of the DRT, the petitioners have approached this Court by filing the instant writ petition. In paragraph-27 of the writ petition, the petitioners have stated thus:

27. That the learned Appellate Tribunal also relied upon a letter dated 11th March, 1999 issued by the petitioners to the respondent Bank while passing the impugned order dated 27.7.04. The said letter merely contains an admission in writing to the effect that the disbursements were made to the third parties/suppliers. However, the said letter does not go to show that there was any intention on the part of the petitioners that the loan amount in question be disbursed by the respondent Bank

directly in favour of the suppliers/third parties. The learned Appellate Tribunal misinterpreted the aforesaid letter and thereby arrived at a perverse conclusion while passing the impugned order dated 27.8.04 in the instant case. The learned Appellate Tribunal also committed gross error apparent on the face of the record in not appreciating the fact that the petitioners could not avail the benefit of the loan amount due to non payment of the balance amount to the suppliers who in turn did not supply the machineries to the petitioners for non payment of the balance amount by the respondent Bank and inspite of several requests being made by the petitioners the respondent Bank failed to take any steps either to claim refund of the amount already paid or to pay the balance amount to the suppliers for which reason the project of the petitioners could not materialize for no fault of the petitioner.

Further it may be stated herein that the aforesaid letter dated 11.3.99 was not before the learned Tribunal at Guwahati while the impugned order dated 6.2.03 was passed in O.A. Case No. 66/2000. Therefore the learned Appellate Tribunal while passing the impugned order dated 27.7.04 relied upon a document which was beyond the pleadings of both the rival parties in the instant case. Thus, the learned Appellate Tribunal at Kolkata has committed an error which is apparent on the face of the record and the same has occasioned grave/gross injustice to the petitioners.

17. Ext. A-2 is the letter dated 8.4.97 sanctioning the term loan of Rs. 25,00,000/- clearly incorporating therein that the payment should be given directly to the supplier concerned. Although the learned counsel for the petitioners has referred to certain terms and conditions incorporated therein so as to show the alleged violation thereof, but no such ground had been urged in the proceeding before the DRT and the Appellate Tribunal. When the learned counsel for the petitioners was pointed out about the same, he fairly admitted of not having urged such grounds in the proceedings before the Tribunals. However, he submitted that irrespective of whether the said grounds were urged or not, but having regard to the said conditions, it was incumbent on the part of the Tribunals to take notice of the same.

18. The Appellate Tribunal in its impugned judgment and order dated 27.7.04 has vividly discussed the entire materials on record. Referring to the letter dated 30.7.97 written to the suppliers by the defendant No. 2, the Appellate Tribunal has held that the said two letters would clearly indicate that the Bank had disbursed the amounts to the suppliers. In this connection, learned Tribunal has also referred to the letter dated 11.3.1999 inter alia stating that "Please note that till today we have got Rs. 22.27 lacs only, from your bank as term loan". The Appellate Tribunal-has rightly held that the same was clear admission in writing on the part of the petitioners that the disbursements were made to the suppliers as per the terms and conditions incorporated in the sanction letter, which also contained the clause that "no cash withdrawal will be allowed in C/C account", meaning thereby the amounts would be disbursed by the Bank directly in favour of the suppliers.

19. In view of the above findings, the arguments advanced by the learned counsel for the petitioners that the Bank had compelled them to execute the security document or that they did not receive any money from the Bank in terms of the sanctioned loan are not acceptable, there being no basis whatsoever for the same. It is also not acceptable that the statement of accounts, which was duly executed in the proceeding, is not acceptable.

20. Needless to say that the facts and evidence already appreciated by the DRT and the Appellate Tribunal cannot be set at naught by exercising the power of judicial review under Article 226 of the Constitution of India. This Court exercising writ jurisdiction, cannot re-appreciate the evidence and sit on appeal over the findings of fact recorded by both the Tribunals. It is not a case of findings being perverse and/or there is no evidence to return the findings impugned in this writ petition. In view of the above, the writ petition is liable to be dismissed, which I accordingly do, Without however any order as to costs.