BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 318/2004

Between

Credit Agricole Corporate and Investment Bank
(Formerly Known as Calyon Bank) … Appellant/s

V/s.

Saf Yeast Company Ltd. …Respondent/s

Mr Ismail Nasikwala along with Mr Farid Karachiwala, Ms Sneh Parikh and Ms Rudhdi Walawalkar, i/b M/s. J. Sagar Associates, Advocate for Appellant.

Mr Denzil D'mello along with Mr Austin Fernandes, Advocate for Respondent.

-: Order dated: 31/07/2023:-

This is an appeal filed by the Appellant Bank impugning the judgment and order dated 01.04.2004 in Original Application (O.A.) No. 2111 of 2000 (initially filed as High Court Summary Suit No. 1758 of 1999) on the files of the Debts Recovery Tribunal No. II, Mumbai (D.R.T.).

2. The Summary Suit referred to above, was filed for recovery of ₹45,76,832.56 together with interest at the rate of 13% per annum on the principal amount of ₹36,42,703.63 with effect from 10.03.1999 till realisation. The Appellant was originally named "Banque Indosuez" which later became a constituent of Credit Agricole Indosuez and was known as Calyon Bank. Now the Appellant is known as Credit

Agricole Corporate and Investment Bank. The Respondent is a company named Saf Yeast Company Ltd.

3. The Appellant Bank had advanced a sum of ₹1,98,26,227.13 to the Respondent against a letter of credit dated 04.02.1997 credited to the current account of the Respondent on the negotiation of the LC.

4. The Respondent intended to export Indian cane molasses to an importer in Amsterdam named M/s. Schuurmans En Van Ginneken B.V. The Respondent informed the Appellant that the payment was to be received from the importer by way of a letter of credit. The Appellant agreed to act as advising bank and notified sight of LC No. 11R1708411 dated 04.02.1997 for $7,02,000 issued by Mespirson N.V. Amsterdam on behalf of the aforesaid importer on 06.02.1997. The Appellant was appointed by the Respondent to negotiate the documents on its behalf under the terms of the LC. The original LC along with invoice number MOA004 dated 15.02.1997 for a sum of $5,59,621.92 together with the sight draft and other relevant documents were forwarded to the Appellant by the Respondent under a covering letter dated 20.02.1997. The Appellant was requested to release to proceeds and the Respondent agreed that in case of any discrepancies, the documents may be sent on a collection basis and the proceeds be released under reserve. The LC also contains a clause that demurrage at the charter party rate and dead freight incurred at loading was deductible from the value of the commercial invoice.

5. The Respondent informed the Appellant that the goods had already been sent on 17.02.1997 and that there was no demurrage deductible from the said invoice. After making the usual deduction

towards fees/charges, ₹1,98,26,227.13 was paid under reserve to the Respondent on 24.01.1997 relying upon the information given by the Respondent. Interest at the rate of 13% p.a. was charged for 25 days. The credit advice further stipulated that if the bill was not realised during the normal transit period the Respondent will pay the Appellant interest for the delayed period. The amount was accepted by the Respondent on the said terms and conditions. On the documents being presented by the Appellant to the issuing Bank it was informed by way of a telex message on 03.03.1997 that a sum of $1,01,531.25 has been deducted from the invoice amount towards demurrage in terms of the LC and that a further sum of $50 was deducted towards payment of bank charges. The Appellant thus received a sum of $4,58,040.67. The Respondent was informed by the Appellant by a letter dated 04.03.1997 about the receipt of the telex message referred to above and asked the Respondent to remit into their current account the aforesaid deficit amount. The copies of invoices raised by the importer, the demurrage charges, etc. were also forwarded to the Respondent on 08.03.1997. The Respondent did not pay the amount and instead addressed the Appellant with a letter dated 11.03.1997 stating that NCS Estates Pvt. Ltd. and Ganesh Benzoplasts Ltd. were liable for demurrage. The Appellant informed the Respondent by letter dated 17.03.1997 that nothing was informed regarding the arrangement between the Respondent and the above-mentioned two concerns and that the involvement of those two companies had no relevance to the transaction between the Appellant and the Respondent.

6. A lawyer notice was issued on 14.10.1998 to the Respondent demanding the amount due. There was no positive response to the notice. A reply was received by the Appellant on 10.11.1998 contending that the amount was payable by M/s NCS Estates Pvt. Ltd. Repeated demands were made. Ultimately the Summary Suit was filed which got transferred and refiled as O.A.

7. The Respondent contested the O.A. by filing a written statement claiming a set-off ₹33,21,961/- together with interest at the rate of 24% per annum on ₹13,79,710.42. It was also contended that the amount claimed by the Appellant would not fall within the definition of "debt due" under the provisions of the Recovery of Debts Due to Bank & Financial Institutions Act, 1993('RDDB&FI Act', for short) and therefore, the D.R.T. has no jurisdiction. It is also stated that M/s NCS Estates Pvt. Ltd. is a necessary party and that the application would be bad for non-joinder of the party. It is attempted to be made out that the export contract was a tripartite contract between NCS Estates Pvt. Ltd, the Appellant and the Respondent. The Respondent would also indicate that NCS Estates had even issued a cheque in favour of the Appellant which was dishonoured resulting in the Appellant proceeding against it under the provisions of the Negotiable Instrument Act. A counter-claim is also raised contending that the foreign buyer had contracted with NCS Estates for the supply of molasses and the contract had endorsed the contract in favour of the Respondent from whom the goods were bought. The Appellant was, therefore, not justified in appropriating any amount from the Respondent. The act of the Appellant would, therefore, amount to

misappropriation and a criminal complaint is also lodged.

8. The Appellant filed a written statement to the counter-claim denying the contention raised by the Respondent regarding the involvement of NCS Estates. The Appellant admitted that by inadvertence, credit to export bill proceeds amounting to ₹12,86,115.80 received from time to time was not given by the Appellant and the Respondent was informed by letter dated 24.11.1999 by the Appellant Counsel that the same would be rectified. Accordingly, on 20.11.2000 the O.A. was amended. The order allowing the amendment was challenged before the D.R.A.T. in vain. Consequent to the amendment, the claim in the application stood reduced by ₹12,86,115.80 making the claim amount ₹32,21,620.95.

9. In 2003, pending adjudication of the O.A., the Respondent tendered a pay order of ₹64,48,983/- to the Appellant being the reduce principal amount together with interest at the rate of 13% p.a. In the meanwhile, the Andhra Pradesh High Court had in a liquidation proceeding against NCS Estates directed a deposit of the amount. The order was challenged in vain before the Division Bench and also before the Apex Court. Eventually, an undertaking was given by NCS Estates before the Andhra Pradesh High Court admitting its liability to the Respondent which includes the subject matter of the dispute between the Appellant and the Respondent. The Respondent also received part of the amount. Accordingly, the pay order in favour of the Appellant was furnished and the counter-claim was not pressed. The D.R.T. directed the parties to file an affidavit with calculation and accordingly, affidavits were filed but there was a vast difference in the

calculation. The D.R.T. once again directed to submit clear calculation. Considering the facts and circumstances, the Ld. Presiding Officer decreed that the claim in the O.A. was satisfied after appropriating ₹41,01,247.62 from out of the money tendered by the Respondent. The Appellant Bank was directed to pay to the Respondent a sum of ₹23,47685.38 together with interest at the rate of 13% per annum with effect from 21.02.2003 till realisation. The Appellant is aggrieved and hence, in appeal.

10. The Ld. Counsel appearing for the Appellant submits that the Ld. Presiding Officer exceeded his jurisdiction by directing a refund of the amount to the Respondent erroneously. The counter-claim of the Respondent was dismissed by the D.R.T. on 13.03.2003 due to non-payment of the court fee. It is submitted that a Recovery Certificate could not have been issued in favour of the Respondent in an O.A. filed by the Appellant after having dismissed the counter-claim. The affidavit dated 10.03.2004 and the misc. Application filed by the Appellant seeking leave to file additional calculations to demonstrate how the amounts under the said affidavit were arrived at, were never considered. It is further submitted that tendering a cheque for ₹64,48,983.63 by the Respondent without considering the counter-claim made would establish the fact that the Respondent did not intend to pursue the counter-claim. The submission of a cheque by the Respondent to clear the dues of the Appellant is an acknowledgement of the liability. The Appellant, therefore, seeks a reversal of the order passed by the Ld. Presiding Officer.

11. Per contra, the Ld. Counsel appearing for the Respondent

submits that it is pointed out that the Appellant Bank took two years to amend their claim only consequent to the filing of criminal proceedings against the Bank at Hardoi. It is pointed out that the Bank had retained ₹1,78,488.73 as interest at the rate of 13% on the value of the bill negotiated. This retention represents the period of waiting till the Bank gets reimbursement from the overseas Bank/buyer. The sum of ₹98,681.34 was not reduced by the Bank from its claim of demurrage. The said amount is due to the Respondent. The D.R.T. has rightly allowed the Respondent to claim this amount. It was found that the Bank had wrongly calculated the amount and hence, ordered a refund.

12. The Ld. Counsel for the Respondent has relied upon some decisions in support of his argument. The Hon'ble High Court of Gujarat has in *Pankaj B. Mangroliya vs. Andhra Bank MANU/GJ/0826/2022* held that an exercising jurisdiction under Sec. 19(25) of the RDDB&FI Act the Tribunal is empowered to direct refund of an amount together with interest by the Bank to the Defendant. The Ld. Counsel also relies upon the decision of the High Court of Bombay in *Anil Nandakishore Tibrewala & Ors. vs. Jammu and Kashmir Bank Ltd. & Ors MANU/MH/0734/2006*. No interference whatsoever is called for in the appeal and seeks a dismissal of the appeal.

13. It is pertinent to note that the D.R.T. had vide order dated 13.03.2003 allowed Exhibit 36 application filed by the Respondent as well as the amendment application filed by the Appellant. The cheque for ₹64,14,983 being the full amount claimed under the O.A. was

submitted by the Respondent on 20.02.2003. In view of the order of the D.R.T., the Respondent was granted the liberty to make full payment to the Appellant and on the very same date, the counter-claim preferred by the Respondent stood dismissed. The allowing of the amendment application was challenged by the Respondent before the D.R.A.T. by filing Misc. Appeal No. 125 of 2003 in vain. In the impugned order also, in paragraph 12, the Ld. Presiding Officer has opined that the amount was tendered and the set-off/counter-claim was not pressed. The Respondent has not come up in appeal over the finding that the counter-claim was not pressed and consequently dismissed. Since the counter-claim was dismissed, I find that the Ld. Presiding Officer was not justified in directing a refund to be made by the Appellant to the Respondent. Because of the dismissal of the counter-claim, it was not possible to direct a refund of the amount. The Ld. Counsel for the Respondent would submit that the court fee required for the counter-claim was paid. But that may not be sufficient when there is a specific order to the effect that the counter-claim was dismissed and the said order remains unchallenged. The argument of the learned counsel for the Respondent that exercising jurisdiction under section 19 (25) of the RDDB & FI Act, the D.R.T. has powers to direct a refund in the interest of justice is not acceptable because there was a specific counter-claim made by the Respondent and the same remains dismissed. The decision of the Hon'ble Bombay High Court in *Anil Nandakishore Tibrewala* (supra) is of no help to the Respondent because the said decision mainly deals with the right of a third party claiming interest over the attached/secured asset and not

being made a party to the proceedings before the D.R.T.

14. The Appellant admits that the actual amount of refund payable by the Appellant to the Respondent is ₹20,58,265.69 from out of the amount of ₹64,48,983/-submitted by the Respondents by way of a cheque towards clearing the entire dues. It is admitted that the actual amount realisable was only ₹43,90,717.31 it is now submitted that the entire amount has already been repaid by the Appellant and therefore nothing more is due and payable to the Respondent.

Hence the appeal is allowed and it is made clear that the Appellant is liable to refund a sum of ₹20,58,265.69 alone, and since that amount has been paid the same shall be recorded in the Recovery Certificate issued in favour of the Respondent.

Appeal allowed as above.

Sd/-
Chairperson

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