manupatra

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4613 of 2000

Decided On: 18.08.2009

Industrial Investment Bank of India Ltd.
Vs.
Biswanath Jhunjhunwala

Hon'ble Judges:
Dalveer Bhandari and H.L. Dattu, JJ.

JUDGMENT

Dalveer Bhandari, J.

1. This appeal is directed against the judgment of the High Court of Calcutta in Civil Revisional Jurisdiction dated 10.9.1999 in C.O. No. 1581 of 1999.

2. Briefly stated the facts are as follows:

> The appellant Industrial Investment Bank of India Ltd. (hereinafter referred to as "the appellant") on 27.9.1994 sanctioned the first short term working capital loan of Rs. 3 crores in favour of Modern Malleables Limited (hereinafter referred to as "the borrower company").

3. The loan agreement was entered into between the appellant and the borrower company on 03.10.1994 in respect of the first short term working capital loan of Rs. 3 crores. The said loan agreement was signed on behalf of the borrower company by the respondent as a Director of the borrower company. On the same day, demand promissory note for Rs. 3 crores was executed on behalf of the borrower company in favour of the appellant. The same was executed on behalf of the borrower company by the respondent as the Director of the borrower company. A deed of undertaking to create mortgage in respect of its various immovable properties was also executed on behalf of the borrower company by the respondent.
4. A deed of personal guarantee was executed by the respondent on 03.10.1994 in respect of the said loan granted by the appellant in favour of the borrower company. The relevant clauses of the said deed of guarantee are reproduced.

> 7. This guarantee shall be enforceable against the guarantor notwithstanding that any security or securities comprised in any instrument(s) executed by the borrower in favour of the Industrial Reconstruction Bank of India Ltd. (for short, IRBI) at the time when the proceedings are taken against the guarantor on this guarantee, be outstanding or un-realized or lost.

5. Clause 11 of the deed of personal guarantee reads as under:

manupatra

11. To give effect to this guarantee, the IRBI may act as though the guarantors were the principal debtor to the IRBI.

6. The appellant sanctioned the second term working capital loan of Rs. 3 crores on 15.03.1995 in favour of the borrower company. The Demand Promissory Note for Rs. 3 crores was executed on 21.03.1995 on behalf of the borrower company by the respondent as the Director of the borrower company in favour of the appellant. A deed of undertaking to create mortgage in respect of its immovable properties was also executed on behalf of the borrower company in respect of the said second short term working capital loan.
7. The borrower company committed defaults in the payment/repayment of the principal amount of the loan as well as interest, liquidated damages and other moneys. Some of the cheques issued on behalf of the borrower company by the respondent were dishonored for want of funds. Consequently, the proceedings started against the respondent under Section 138 of the Negotiable Instruments Act, 1881 are pending before the court.
8. In view of the defaults committed by the borrower company, the appellant on 18.01.1997 issued a demand notice to the borrower company recalling the entire loans and calling upon the borrower company to pay the total sum of Rs. 5.40 crores together with further interest at the rate of 17% per annum and liquidated damages at the rate of 2.1% from 1.1.1997 till repayment.
9. The appellant on 18.03.1997 filed an application in the High Court of Calcutta under Section 40 of the Industrial Reconstruction Bank of India Act, 1984 (for short "IRBI Act") for attachment and sale of the assets of the borrower company. The respondent was not made a party to the said application, inasmuch as there was no scope for seeking any relief against the guarantor under an application under Section 40 of the IRBI Act. Hence, a prayer was made for attachment of the assets of the borrower company. The provisions of Section 40 of the IRBI Act are pari materia with the provisions of Sections 31 and 32 of the State Financial Corporations Act, 1951.
10. A notice was issued on 20.3.1997 to the respondent invoking the personal guarantee given by him and calling upon him to pay the sum of Rs. 5.40 crores together with further interest and liquidated damages from 1.1.1997 till repayment.
11. The High Court on the said application filed by the appellant on 31.03.1997 under Section 40 of the IRBI Act appointed a Receiver for the purpose of taking symbolic possession of the assets mentioned in Schedules `A', `B', `C' and `D' to the said application and also for making an inventory of the same. The High Court issued an order of injunction restraining the borrower company from parting with the possession, disposing of or alienating or otherwise encumbering any of the said assets in any manner.
12. The appellant on 17.7.1997 filed an application against the respondent under Section 19 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 in the Debts Recovery Tribunal, Calcutta. The appellant in the said application has prayed for a certificate against the said respondent for a sum of Rs. 5.40 crores along with further interest and liquidated damages.
13. The respondent on 20.3.1998 also filed an application in the Debts Recovery Tribunal, Calcutta for stay of further proceedings in the case filed by the appellant in the same Tribunal, inter alia, on the ground that the rights of the appellant against the respondent as guarantor did not crystallize till the rights of the appellant against the borrower company are established.
14. The Presiding Officer of the Debts Recovery Tribunal, Calcutta on 18.05.1999 relying on State Bank of India v. Indexport Registered and Ors., AIR 1992 SC 1740 dismissed the application filed by the respondent for stay of further proceedings in the case filed against him and held that the appellant cannot be forced to exhaust

manupatra

remedy elsewhere and then to proceed against the guarantor and further that the liability of a guarantor is co-extensive with that of the principal debtor.
15. The respondent on 29.5.1999 filed an application under Article 227 of the Constitution of India in the High Court of Calcutta against the order dated 18.5.1999 passed by the Debts Recovery Tribunal, Calcutta.
16. The High Court of Calcutta by the impugned judgment allowed the application filed by the respondent under Article 227 of the Constitution of India and stayed further proceedings in O.A. No. 156 of 1997 filed by the appellant against the respondent in the Debts Recovery Tribunal, Calcutta. The appellant against the said judgment/order has filed this appeal.
17. Mr. J. L. Gupta, learned senior counsel appearing for the appellant submitted that the appellant bank is fully justified in initiating proceedings against the borrower company as well as its guarantor before the different courts.
18. Mr. Gupta also submitted that the liability of the guarantor and the principal debtor are co-extensive and not in alternative. He also submitted that Sections 29, 31 and 32 of the State Financial Corporations Act are pari materia with Sections 39, 40 and 41 of the IRBI Act.
19. Mr. Gupta, in support of his submission, placed reliance on a judgment of this Court in Bank of Bihar Ltd. v. Damodar Prasad and Anr. (1969) 1 SCR 620. In that case, the court referred to a judgment in Lachhman Joharimal v. Bapu Khandu and Tukaram Khandoji (1869) 6 Bombay High Court Reports 241, in which the Division Bench of the Bombay High Court held as under:

> The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.

This Court, while approving the said judgment, observed that, "the very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."
20. In State Bank of India v. Indexport Registered (supra), this Court held that the decree holder bank can execute the decree against the guarantor without proceeding against the principal borrower. Guarantor's liability is co- extensive with that of the principal debtor. In that case, this Court further observed that, "the execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree- holder. The question arises, whether a decree which is framed as a composite decree as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of the decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the principal debtor. The court further observed that "the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided by the contract".
21. The term "co-extensive" has been defined in the celebrated book of Polock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 as under: "Co-extensive. - Surety's liability is co-extensive with that of the principal debtor.
A surety's liability to pay the debt is not removed by reason of the creditor's omission to sure the principal debtor. The creditor is not bound to exhaust his

manupatra

remedy against the principal before suing the surety, and a suit may be maintained against the surely though the principal has not been sued."
22. In Chitty on Contracts, 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under,

> Conditions precedent to liability of surety.- Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor.

23. In Halsbury's Laws of England, Fourth Edition,Vol. 20, paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for".
24. A Division Bench of the Bombay High Court in Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath and Ors. AIR 1940 Bombay 247 held that the liability of the surety is co-extensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors.
25. A Division Bench of the High Court of Karnataka, in The Hukumchand Insurance Co. Ltd. v. The Bank of Baroda and Ors. AIR 1977 Kant 204 had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. The court held as under:

> The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co- extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.

26. The case of the respondent has never been that the liability of the guarantor is only contingent and if remedies against the principal debtor failed to satisfy the dues of the decree holder, then only the bank can proceed against the guarantor.
27. Mr. Gupta also asserted that the remedy under Section 19 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 is not in derogation of Section 40 of the IRBI Act.
28. In Transcore v. Union of India and Anr. (2008) 1 SCC 125, this Court in great detail examined whether withdrawal of suit pending before the Debts Recovery Tribunal under DRT Act is not a pre-condition for taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This Court held that it is for the bank or the financial institution to exercise its discretion.
29. In A.P. State Financial Corporation v. Gar Re- Rolling Mills and Anr. (1994) 2 SCC 647 this Court observed that the right vested in the corporation under Section 29 of the Act is besides the right already possessed at common law to institute a suit or the right available to it under Section 31 of the Act. In that case, it was further observed that on a conjoint reading of Sections 29 and 31 of the said Act, it appears that in case of default in repayment of loan or any installment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern, one under Section 29 and another under Section 31. Since, the corporation must be held entitled and given full protection by the court to

recover its dues it cannot be bound down to adopt only one of the two remedies provided under the Act. The Court further held that the doctrine of election is not applicable to this case.

30. The legal position as crystallized by a series of cases of this Court is clear that the liability of the guarantor and principle debtors are co-extensive and not in alternative. When we examine the impugned judgment in the light of the consistent position of law, then the obvious conclusion has to be that the High Court under its power of superintendence under Article 227 of the Constitution of India was not justified to stay further proceedings in O.A. 156 of 1997.

31. Consequently, the appeal is allowed and the impugned judgment of the High Court of Calcutta is set aside. The appellant shall be entitled to costs of Rs. 50,000/-.