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

Date of decision: March 18, 2014

+ RFA(OS)129/2013

ASHOK KUMAR CHATURVEDI .. Appellant

Represented by: Mr.Sandeep Sethi, Senior Advocate
instructed by Mr.Arun Batta,
Advocate

versus

UCO BANK & ORS. Respondent

Represented by: Ms.Ruchi Singh and Mr.Siddharth
Aggarwal, Advocates for R-1

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J (Oral)

CM No.15905/2013

Allowed, subject to just exceptions.

RFA(OS)129/2013

1. The present Regular First Appeal is filed by the appellant aggrieved by the judgment of the learned Single Judge of this Court dismissing the suit of the appellant *in limini* without issue of notice to the respondents i.e. defendants to the Suit.

2. The appellant filed the present suit for recovery of ₹3,00,34,606/- (Rupees Three Crore Thirty Four thousand six hundred and six only) and for decree of declaration, permanent and mandatory injunction. Respondent No.1 is a public sector bank. Respondents 2 and 3 are companies under

common management of respondents 4 to 6 i.e., Directors/persons in charge. Respondent No.3 is a Joint venture company where respondents 7 and 8 had 80% share capital and respondent No.2 had 20% share capital. Respondent No.3 had taken financial assistance from respondent No.1 whereby the appellant had given personal guarantee for the said financial facility. Pursuant to a sale and purchase agreement dated May 21, 2010 between respondent No.2, respondent No.3 and respondents 7 to 12, the said respondents 7 to 12 agreed to sell their entire shareholding in respondent No.3 to respondent No.2 in a phased manner. Respondent No.2 was to purchase the entire equity of respondents No.7 to 12 and replace all the personal and corporate guarantees of the appellant given for obtaining financial assistance by respondent No.3 from respondent No.1.

3. Pursuant to the above Agreement management and control of respondent No.3 was passed on to defendant No.2/its director i.e., respondents 4 to 6 on 26.08.2010.

4. Respondent No.2 is stated to have defaulted. Post Dated Cheques given were returned dishonoured. Respondent No.2 filed a petition under section 9 of the Arbitration & Conciliation Act being OMP No.1077/2012 before this Court. During pendency of the said petition, respondents 2 and 3 entered into a settlement with respondents 7 to 12 and an application under Order XXIII Rule 3 CPC was filed. The affidavits in support of the application were said to have been given by respondents 4 and 5 on behalf of respondents No.2 and 3. In terms of the Compromise it was agreed that respondents 2 to 5 will return/replace all the guarantees of the appellant against financial facilities taken from respondent No.1 within sixty days and will not default in the repayment of loan to respondent No.1. The compromise was recorded on December 18, 2012 before Court.

5. Despite the above Compromise, it is stated that respondents 2 to 5 again defaulted on their commitment. The concerned respondents No.7 to 12 are stated to have filed Contempt Petition against the said defaulting respondents No.2 to 6.
6. Further, on account of continuing default by respondent 2 to 6, the appellant was compelled to deposit in his capacity as a guarantor on April 09,2013 a sum of ₹1,04,25,770/- (Rupees One Crore Four Lacs Twenty Five Thousand Seven Hundred and Seventy only) and on April 22, 2013 a sum of ₹1,65,28,140/-(Rupees One Crore Sixty Five Lacs Twenty Eight Thousand One Hundred and Forty only).
7. The appellant hence filed the present Suit seeking the following reliefs:-

“(a) pass a decree of recovery of money in favour of Plaintiff and against Defendant Nos. 1 to 6 thereby directing the Defendant Nos.1 to 6 to jointly and severally pay a sum of ₹3,00,34,606/- (Rupees three crores thirty four thousand six hundred and six only) to the Plaintiff alongwith pendet-elite and future interest @ 24% per annum from the date of filing of the present Suit till its realization;

(b) pass a decree of declaration in favour of plaintiff and against Defendant No.1 thereby declaring that the Personal Guarantee given by the Plaintiff to the Defendant No.1 Bank against the financial facilities granted to Defendant No.3 has become null and void and as such not enforceable and the plaintiff is completely absolved of any liability towards the defendant No.1 bank in respect of the loan granted to defendant No.3;

(c) pass a decree of permanent injunction in favour of Plaintiff and against Defendant No.1 thereby restraining the Defendant No.1 from either enforcing the Personal Guarantee given by the Plaintiff or making any demand on the Plaintiff on account of the Personal Guarantee given by him for securing the loan for the Defendant No.3, JVC or declaring the name of the Plaintiff

*to RBI/CIBIL authorities as defaulter;
(d) pass a decree of mandatory injunction in favour of Plaintiff and against Defendant Nos.2 to 6 thereby directing them to replace/return the Personal Guarantees of the Plaintiff given by him against the financial facilities granted to Defendant No.3, JVC and direct the Defendant No.1 to accept the same;”*

8. The impugned order holds that no cause of action has arisen in favour of the appellant and against respondent No.1. Hence, as reliefs (b) and (c) above are directed only against respondent No.1 the Suit would not lie for the same relief. The impugned order rejects the submission of the appellant that respondent No.1 was aware of the terms and conditions of the agreement dated May 21,2010 and respondent No.1 could hence no longer invoke the personal guarantee of appellant as he had already exited from the management of respondent No.3 inasmuch as respondent No.1 had no control over the change in Management of respondent No.3. Further, the personal guarantee of appellant does not get released as claimed by the appellant. The further submission of the appellant that respondent No.1 did not permit liquidation of the loan amount by respondent No.3 or that respondent No.1 materially altered the terms of the contract of loan facilities as compared to the terms of the original contract of loan facilities was also rejected.

9. Regarding relief (a) the impugned order holds that there is no relief claimed against respondent No.1 in the said relief. The order further holds that in view of the compromise recorded in OMP 1077/2012 in Court on 18.12.2012, it is not open for the appellant to seek to re-agitate the issues qua respondents 2 to 6 and the present Suit is barred against the said respondents 2 to 6 due to principles of *res judicata*.

10. On the basis of the above, the impugned order dismissed the suit qua respondent No.1 under Order VII Rule 11 (a) and against respondents 2 to 6 under Order VII Rule 11 (d) and the plaint was rejected.

11. We have heard learned senior counsel for the appellant and counsel for respondent No.1. Respondents 2 to 6 have been proceeded against *ex-parte*.

12. We are persuaded to remit the present Suit back to the Single Judge for consideration on merits. The impugned order has ignored the material proposition i.e., the right of the appellant to recover the dues paid by him to respondent No.1, which payment he was compelled to make on account of the personal guarantee given. As per the plaint the appellant has made payments to respondent No.1 bank on April 09, 2014 and April 27, 2013, much after the compromise recorded on December 18, 2012. Under Section 145 of the Indian Contract Act, 1872 in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety can recover the sum that he has paid under the guarantee. The said section 145 reads as follows:-

“145.Implied promise to indemnify surety.- In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from, the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.”

13. Hence, in view of the above provisions of law a cause of action arose in April 2013 in favour of the appellant to recover the said sum of ₹2,69,53,910/- which was paid by the appellant for and on behalf of respondent no.3 to respondent No.1 on account of the personal guarantee that the appellant had given. This cause of action had arisen subsequent to the said compromise recorded in Court on December 18, 2012. The said

compromise would obviously not deal with the said sum as it is a subsequent event. This claim of the appellant is not barred by Order VII Rule 11 CPC.

14. The impugned order also ignores that as per material on record, the appellant was not a party to OMP 1077/2012. As per the Plaint the compromise has been entered into between respondent 2 and 3 and respondent 7 to 12. The affidavits in support of the compromise application have also been signed by respondents 4 and 5 in the capacity of Directors of respondents 2 and 3. The compromise application is also on record and shows that the appellant is not a party to the said compromise application.

15. Section 11 CPC provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been so dealt with in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title. In view of the fact that the appellant was not a party to OMP 1077/2012 it would not be possible to say determinatively at this stage that the present Suit is barred by principles of *res judicata* against respondents 2 to 6 as held in the impugned order.

16. In view of the above, we set aside the impugned order dated 29.07.2013. The matter is remanded back to the learned Single Judge for adjudication on merits. None of the respondents have so far filed their written statement. The parties would be free to file their written statement.

17. We clarify that we have not dealt on merits of the issues which were decided in favour of respondent No.1 in the impugned order. Respondent No.1 is free to raise the said issues in the Written Statement and press for the same before the learned Single Judge in accordance with law.

18. The appeal in accordance with the above order is allowed.

19. No order as to costs.

CM No.15904/2013

Dismissed as infructuous.

**JAYANT NATH
(JUDGE)**

**PRADEEP NANDRAJOG
(JUDGE)**

MARCH 18, 2014
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