

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 26.06.2018
ORDER PRONOUNCED ON : 20.07.2018

CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.P.No.9643 of 2018
and W.M.P.No.11563 of 2018

M/S.Blue Star Limited,
Having its Regd office at
Kasthuri Buildings,
Mohan.T.Advani Chowk,
Jamshedji tata Road, Churchgate
Mumbai 400020 and having its Regional
office at No 2.K.R.M Plaza, 2nd floor,
Harrington Road, Chetpet,
Chennai 600031 represented by its authorized
signatory Mr.S.Ganesh

....Petitioner

Vs.

1.Andhra Bank,
Adayar Branch,
No.12, 1st Main Road
Gandhi Nagar, Adayar
Chennai-20.

2.M/s.Mustaang Electronics Pvt Ltd.,
No.78 lattice lattice Bridge Road,
Adayar, Chennai-20.

3.K.Jayaraj

4.Jeyaprakash Narayanan

5.V.M.Mody

6.D.H.Shah

7.V.B.Srinivasan

... Respondents

PRAYER: The Writ Petition has been filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, calling upon the order dated 22.03.2017 passed in RA 78 of 2014 on the file of the Debt Recovery Appellate Tribunal at Chennai and quash the same.

For Petitioner : Mr.L.Prabahar

For 1st Respondent : Mr.P.Veeraragharan

O R D E R

SUBRAMONIUM PRASAD, J.

The present Writ Petition is directed against the order dated 22.03.2017 by the Debt Recovery Appellate Tribunal at Chennai in RA 78 of 2014.

2. The petitioner is a distributor of Television sets. One M/s.Mustaang Electronics Pvt Ltd., / second respondent herein is a manufacturer of Black and White Colour Television sets. The petitioner / appellant and M/s.Mustaang Electronics Pvt Ltd. (respondent No.2 herein), entered into an agreement on 06.02.1985 for marketing Television sets manufactured by the second respondent. For this purpose, a sum of Rs.10 lakhs was given as advance by the appellant and this amount was to be utilized by Respondent No.2 for providing bank guarantee. Bank guarantee was not provided and therefore, it was agreed between the petitioner / appellant and the second respondent and that this sum was to be adjusted towards supply of television sets manufactured by the second respondent to the petitioner / appellant. The second respondent wanted some credit facilities from the banks. For this purpose, there were joint discussions between the officer of the bank (first respondent) the appellant and respondent No.2 on 22nd & 23rd May 1985.

3. A letter dated 24.05.1985 was sent by the appellant to respondent No.2 copy marked to respondent No.1 as to what transpired in the meeting held on May 22nd and 23rd, 1985. The relevant portion of the letter reads as under:

"We write this further the joint discussions our Mr.S.D.Malgonkar, and Mr.Gautam Bose had along with Mr.Pasad, Mr.Viswanath and Mr.Sumumaran of Andhar Bank at your office on may 22nd and 23rd 1985. This was specifically on the subject of your financing proposal consisting of Rs.10 lakhs bill discounting facility and Rs.10 lakhs cash credit facility pending with M/s.Andhra Bank, which we understand is likely to be approved by May 31, 1985.

It was suggested by the representatives of Andhra Bank that in order to assist you in your cash flow requirements and commencement of production, we should not adjust the advance of Rs.10 lakhs given to you under cover of our letter dated February 7, 1985 for a period of one month from date.

With a view to co-operate with you even beyond the normal terms agreed, we confirm having acceded to the above suggestion of the bank.

Kindly ensure that all formalities are completed

and that your bank finances are

available by end May as promised.

You may also forward to us details of bills and receipted challans pertaining to Blue Star Colour Televisions already supplied for that whatever finances are available to you will be utilised only for production of Televisions for Blue Star and for expenses only directly related to supplies to us.

Please however, note that our relaxation of earlier agreed terms is strictly subject to your improved performance and that you will deliver atleast 8 Nos Blue Star CTVs per day for the balance period of May and atleast 300 sets during June 1985.

It has also been agreed that the advance of Rs.10 lakhs will attract interest at the rate of 18% per annum with immediate effect."

4. This was followed by another letter on 31.05.1985 from the petitioner/appellant to first respondent / bank confirming receipt of 13 colour television sets. The letter reads as under:

We write this further to our earlier letter dated May 30, 1985 enclosing the accepted Power of Attorney executed by Mustanng Electronics Private Limited in your favour.

We wish to clarify that the list of various authorised singantories detailed in our earlier letter will be effective for all supplies made by Mustang Electronics Private Limited to us henceforth. However, over the past couple of months, we have received a total of 13 Nos Colour Television sets from Mustanng Electronics Private Limited at our various locations as per statement below:-

Inv. No. Sl.Nos.	Date	Qty	Location
2373	8/5	1	Madras 275
2383	20/5	4	Bombay 285 - 289
107	20/5	2	Bangalore 100005 - 006
45	22/4	2	Vizag @ 4% CST 159 & 176
2384	20/5	4	Madras 1000011 - 004

13

The Delivery Challans against the the above 13 nos colour TVs have been signed by various Blue Star personnels other than our standardised list. We, however, confirm that these 13 sets have been received by us in good order and you may provide bill discounting facility to Mustang Electronics against documents related to these sets as a

5. Respondent No.2 herein started defaulting the payments to respondent No.1. The appellant in order to avoid the liability wrote a letter dated 23.10.1985, which reads as under:-

We refer to your letter No.703/18/77/88 dated September 30, 1985 on the above subject.

2. At the outset we wish to clarify that we have not entered into any agreement with you in respect of the invoices mentioned by you or otherwise. In short, there is no obligation on us that even if a particular invoice is not in fact payable by us to "Mustaang", we should nevertheless pay you the same. In fact, none of the invoices above mentioned is payable by us to "Mustaang", in view of the facts and circumstances which have now arisen between "Mustaang" and us.

3. It might interest you to know that "Mustaang" did not furnish us with a bank guarantee for Rs.10 lacs and committed several and repeated breaches of our arrangement with them. This arrangement has been terminated by "Mustaang" by unilateral conduct on or about 23.9.85.

6. Suit is O.S.No.89 of 1988 was filed by respondent No.1 bank on the original side of this Court. In the suit the appellant was arrayed as the 7th defendant. The relief sought for against the appellant herein was for a recovery of a sum of Rs.3,42,936/- with interest at the rate of 18% per annum from date of filing of the suit till the date of realisation. This amount was for the bills discounted by respondent No.2 from respondent No.1 back wherein the petitioner / appellant was arrayed as the seventh defendant. The averments against the appellant in the plaint read as follows:

"The plaintiff submits that in respect of Bill Discounting facility availed by the first defendant to the tune of Rs.10 lakhs, first defendant represented to the plaintiff that they had an agreement with the 7th defendant for sale of both Black & White Colour Television Receiver Sets produced by them and wanted the plaintiff to discount bills drawn on the 7th defendant by the first defendant for supplies made by them. The 7th defendant in an by letter date supplied made by the first defendant to the 7th defendant and which bills were discounted by the plaintiff would not be adjusted by the 7th defendant against any advance made to the first defendant further confirmed that the said undertaking not to adjust the amount due under the discounted bill 31.07.1985. The Plaintiff submits that during the period till 31.07.1985, the plaintiff discounted the following bills in respect

of supplies of television set made by the first defendant to the 7th defendant and which remained unpaid.

Date	SBP No.	Amount	Bill No. & Date	Branch
14.06.1985	427	20404/-	2383 20.5.85	Nungambakkam
24.07.1985	514	120213/-	2406 13.7.85	"
30.07.1985	522	127680/-	164 30.7.85	Bangalore
	523	127680/-	163 30.7.85	"

The plaintiff in and by letter dated 30.09.1985 sought payment thereof from the 7th defendant and were surprised to receive letter from the 7th defendant in going back on the assumption and attempting to avoid liability for payment. It is submitted that the undertaking of the 7th defendant to make payment to the plaintiff constitute equitable drawn by the first defendant and discounted with the plaintiff constitute equitable assignment and by the conduct of the 7th defendant in giving such undertaking and inducing the plaintiff to discount the bills drawn on the 7th defendant by the first defendant, the 7th defendant is estopped from denying its liabilities on untenable grounds in respect of bills drawn on it by the first defendant and discounted with the plaintiff. The plaintiff caused counsel's notice dated 14.2.1986 to be given to the 7th defendant. The 7th defendant is liable to pay to the plaintiff is a sum of Rs.3,95,997/- together with interest at 18% from the respective due dates of the bills. The amount payable by the 7th defendant is as follows:-

S.No.	Bill No. & Date	SBP No.	Amount	Interest
-------	-----------------	---------	--------	----------

Total

1.	2383 20.05.85	427	20,424/-	
2.	24006 13.7.85	514	1,20,213/-	
3.	164 30.07.85	522	1,27,680/-	
4.	163 30.07.85	523	1,27,680/-	

3,59,997/-

The first defendant had also executed a Power of Attorney in favour of the plaintiff authorising to empower it to obtain payments of the bills drawn on the 7th defendant and discounted by the plaintiff. The plaintiff submits that the said amount is also included in the claim against the first defendant. The defendants 2 to 6 are also jointly and severally liable for the said amount as guarantor."

7.The petitioner / appellant filed a reply statement stating that there was no tripartite agreement between the petitioner herein and the respondents 1 and 2 herein for the discounting of bills for supplies made by the second

respondent herein. It was submitted that there was no privity of contract between the petitioner / appellant and the first respondent / bank, regarding discounting of bills presented by respondent No.2 to the bank.

8. After the establishment of Debts Recovery Tribunals under The Recovery of Debts and Bankruptcy Act, 1993, the suit was transferred to the Debts Recovery Tribunal, Chennai, and was numbered as T.A.No.380 of 1998. The Debts Recovery Tribunal after considering the letters mentioned *supra* and the evidence, came to a conclusion that the petitioner / appellant had agreed that they would honour the bills which were discounted by respondent No.1. The relevant findings of the Debt Recovery Tribunal are as under:

Further Exh.A.79 is the list of outstanding supply bills purchased from various sundry debtors. In the said list, the bills outstanding against the 7th defendant namely Blue Star limited has also been shown to the tune of Rs.3,95,997/-. Further, the letter dated 24th May 1985 marked as A86 clearly indicates that the 7th defendant agreed for the bill discounting facility in respect of television sets supplied to them or to be supplied to them by D1. It is important to note herein the relevant portion of the letter which is as follows:

"You may also forward to us details of bills and receipted challans pertaining to blue star colour television already supplied for arranging out acceptance for bill discounting". Similarly, the passage which is used in letter dated 31.05.1985 which reproduced below:

"You may provide bill discounting facility to Mustang Electronics namely Defendant No.1 against the documents related to these sets as a special case".

From the aforesaid languages, it is crystal clear that the Defendant No.7 agreed for bill discounting facility granted to D1 for supply of television sets to D7. Accordingly, I am of the opinion that D7 is liable to pay the amount relating to the outstanding supply bills to the tune of Rs.3,95,997/- with future interest as claimed by the applicant bank. As far as the balance amount payable by D1 in respect of advance of Rs.10 lakhs paid by D7 is concerned, it can work out its remedy in a separate forum in a manner known to law."

9. The Tribunal allowed the application holding that the first respondent / bank is entitled for recovery of certain sum of Rs.3,95,997/- with 18% from the date of complaint till date of realisation from the petitioner / appellant. This order was challenged by the appellant by way an appeal before

the Debt Recovery Appellate Tribunal, Chennai. The Appellate Tribunal after going through the records of case came to a conclusion that the petitioner / appellant had admitted to the liability in regard to the television sets supplied by the second respondent to the petitioner. The Debts Recovery Appellate Tribunal came to a conclusion that the participation of the petitioner herein in the meetings between the first respondent / bank and the second respondent and the contents of letter dated 24.05.1985, would amount to admission of liability. The Tribunal however reduced the amount to be paid by way interest amount to be paid. The relevant portion of the Appellate Tribunal reads as under:-

10. After considering the rival contentions of the Counsel of the parties, it becomes clear that the borrowers and Appellant have commercial relation of manufacturer and the dealer. Appellant had advanced Rs.10 lakhs to the Respondents/borrowers. While the appellant found the TV sets of poor quality, then problem arose. Manufacturers/borrowers get into financial crisis also and approach the Bank for some more financial assistance and concessions. Participation of the Appellant in meetings dated 22nd and 23rd May, 1985 of the defaulters and the Bankers is a very important fact. In the light of the aforesaid meeting, if the letter dated 31.05.1985 is taken into consideration, then, it can simply be understood that Bank has a right to recover the money based on the aforesaid admission in the letter.

10. It is to be noted that though in the paragraph 13, the tribunal noted that the petitioner / appellant would be liable to pay of interest 6% per annum, but in paragraph 14 it directed the payment of interest as 9%. It is this order, which has been challenged by way of the instant writ petition.

11. Heard Mr. Mr.L.Prabakar, learned counsel appearing for the petitioner, and Mr.P.Veeraraghavan, learned counsel appearing for the first respondent.

12. The learned counsel for the petitioner submits that the appellant is neither the principal debtor nor guarantor for the loan facility taken by the second respondent from the first respondent. It was submitted that there was no undertaking on the part of the appellant to take over the liability of the second respondent. It was submitted that the letters written by the appellant cannot be construed as an agreement of guarantee by the appellant towards the bills discounting facility extended by the bank to respondent No.2. It was also submitted that the Power of Attorney executed by the second respondent in favour of the first respondent authorising the collection of payment from the petitioner / appellant has not been stamped properly and therefore, the first respondent cannot claim any amount on the basis of Power

of Attorney. It was therefore ultimately submitted that on the absence of privity of contract between the petitioner/appellant and the bank, they cannot be made liable.

13. On the other hand, the learned counsel for the first respondent / bank submitted that the petitioner / appellant was induced by the appellant to extend the bill discounting facility to respondent No.2 and that therefore, the petitioner / appellant is liable to pay the amount claimed by the first respondent / bank. It was submitted that the petitioner / appellant had undertaken to make the payment in respect of the bills raised by the second respondent on the appellant and discounted with the bank.

14. Admittedly, the petitioner is a distributor of television sets and other electronics items. The second respondent is a manufacturer of television sets. There were regular transactions between the second respondent and the petitioner. The second respondent was in need of financial assistance, for which purpose, meetings were held between the first respondent / bank, petitioner and the second respondent. The letter dated 24.05.1985 records that there were discussions between the bank borrower and the petitioner. A perusal of that letter, portion of which has been extracted in the earlier paragraphs would show that the petitioner / appellant had acceded to the suggestion of the first respondent / bank to give bill discounting facility to the second respondent for supply of colour television sets to the appellant. The subsequent letter dated 31.05.1985 sent by the appellant to the first respondent bank confirming receipt 13 colour television sets and that the first respondent / bank may provide bill discounting facility to the second respondent against the documents relating to the television sets is a reiteration of the appellant taking over the liability the payment for the television sets supplied by the 2nd respondent. The letter dated 23.10.1985, by the petitioner / appellant to the bank stating that there is no obligation on the part of the petitioner / appellant to make payment to the bank has to be ignored as an attempt on the part of the petitioner / appellant wriggle out from its commitments.

15. The learned counsel for the petitioner relied on the judgment of the High Court of Delhi in the case of *Indian Overseas Bank Vs. S.N.G.Castorete Pvt. Ltd., and others* reported in AIR 2002 Delhi 309 to buttress his submission that an assurance to pay cannot be understood as a guarantee deed. Paragraph 7 of the said judgment reads as under:

"7.As is apparent from the aforesaid documents, the plaintiff has successfully proved its claims against the defendants 1 to 5 as defendant No.1 is the principal borrower and defendant Nos. 23 to 5 are the guarantors. Defendant No. 6 cannot be held liable as the letter dated 8th August, 1977 was only as assurance by defendant No.6 to pay the

amount and it cannot be construed as a guarantee deed. It was nothing but a recommendation by defendant No.6 in favor of defendant No.1 to advance the loan. The legal liability of a person arises only if a proper document is executed as was done in the case of defendant Nos. 2 to 5. Defendant Nos. 2 to 5 executed deed of guarantees. Letter sent by defendant No.6 was a general assurance that defendant No.6 takes the guarantee of making payment against the outstanding amount. This is a general assurance of a person without having any legal force."

A perusal of the said judgment would show that the same does not apply to the facts of this case. The submission of the appellant that there has to be a separate instrument of guarantee and that the claim cannot be based solely on assurances is not tenable. It is well settled that a contract can be gathered from the conduct of the parties also. No doubt the petitioner is not a guarantor to the credit facilities extended by the bank to respondent No.2, but the conduct of the petitioner and more particularly letters dated 21.05.1985 & 31.05.1985 would show that the appellant had assured the bank that it will honour the amount due to the bank for the bills discounted by respondent No.2. No separate instrument of guarantee is required.

16.The petitioner would also be liable under the principle of 'Novation'. The Delhi High Court in *R.S.Amarnath Mehra & Co. vs. Union of India and others* reported in 51 (1993) DLT 455 has discussed the principles of "Novation" and observed as under:-

"16.Black's Law Dictionary Sixth Edition at page 1064 defines 'Novation' thus:- "NOVATION.A type of substituted contract that has the effect of adding a party, either as obligor or obligee, who was not a party to the original duty. Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties. The substitution by mutual agreement of one debtor for another or of one creditor for another, whereby the old debt is extinguished. A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all parties. The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one. *Blyther v. Pentagon Federal Credit Union*, D.C. Mun. App.,182 A.2d 892,894. In the civil law, there are three kinds of novation: where the debtor and creditor remain the same, but a new debt takes the place of the old one; where the debt remains the same, but a new debtor is

substituted; where the debt and debtor remain, but a new creditor is substituted. *Wheeler v. Ewardell*, 173 Va 168, 2 S.E.2d 377,388."

(17) In Aiyar's *Judicial Dictionary* (11th Edition at page 802) the terms 'Novatio' and 'Novation' are defined thus: "NOVATIO. The substitution of a new obligation for an old one. If the parties to a contract agree to substitute a new contract for it, or to rescind it, or alter it, the original contract need not be performed. (Section 62, Indian Contract Act IX of 1872). A common instance of novation is a partnership case when the members of the new firm take over the liabilities of the old firm. So is an arrangement by way of composition in bankruptcy.

Novation, in fact, the act of replacing a debtor by another who assumes the responsibility to which there must be the assent of the original debtor and creditor as well of the substitute." Novation is a legislative expression of the common law of England. It is a term derived from English Civil Law and it means -that there being a contract in existence some new contract is substituted for it either between the same parties or between different parties, the consideration being the discharge of the old contract. In this regard we may refer to the decision of the House of Lords in *Scarf v. Jardine* 7AC 345, 351:(1881- 85) Aii England Reports 651. Novation of a contract implies a fresh contract, directly or by implication, in place of the original contract. (see *Cheshire, Fifoot and Furmston's Law of Contract*, 11th edition, page 505 (Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made). It is the established proposition that the consideration for the new contract is the discharge of the old. If the new agreement is enforceable then it is not a contract and, therefore, cannot serve as a Novation.

(18) As has been observed in *Lindley on Partnership* 6th edition, page 246 cited in *British Homes Assurance v. Paterson* (1902)2 Ch 404. "in order that one liability may be extinguished by being replaced by another, agreement, it is essential that the person on whom the correlative right resides would be a party to the agreement or should, at all events, show by some act of his own that he accedes to the substitution. Such a contract obviously raises the inference that the parties have agreed to modify their contract, but cannot have the effect of changing the operation of

an unambiguous agreement.. It may at best support, along with other evidence, a claim for rectification. Ottoman Bank v. Chakarian 1721 C 786PC:(1938)AC260; AIR1938 Pc 26."

17. Pollock & Mulla Indian Contract and Specific Relief Acts, (12th Edition) at Page 1214 reads as follows:

"The word 'novation' is used in the marginal note to the section, and is the accepted catchword for its subject matter. It has been thus defined: '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. Novation of a contract comprises two elements: the discharge of one debt or debtor and the substitution of a new debt or debtor. It is well settled that the parties to an original contract can by mutual agreement enter into a new contract in substitution of the old one."

18. The conduct of the parties would show substitution of the old contract of guarantee by a new one under Section 62 of the Indian Contract Act 1872. The conduct of the parties show that it was understood between the three parties that the appellant had agreed to pay for the bills discounted by the respondent No.2 for the Television sets supplied by it to the appellant. It is not necessary that there should be a written contract.

19. The Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal, after going through the facts and evidence, have come to a conclusion that the conduct of the appellant was such that it can be interfered that it had undertaken to pay the bank for the television sets supplied to it by respondent No.2. The judgment of the Courts below cannot be said to be perverse warranting interference under Article 227 of the Constitution of India. It is well settled preposition of law that the High Court, while exercising its jurisdiction under Article 227 of the Constitution of India, cannot substitute its own conclusion to the one arrive it by the Tribunals below. The High Court can interfere with the findings of fact only when they are perverse and based on nil evidence. [Refer - Essen Deinki vs Rajiv Kumar 2002 (8) SCC 400, Rena Dreog vs Lalchand soni 1998 (3) SCC 341].

20. The second submission of the appellant that the power of attorney executed by respondent No.2 in favour of the bank to recover the amount from the petitioner cannot be looked into as it was not properly stamped needs to be rejected. The bank has raised its claim against the appellant on the basis of the conduct of the appellant and the correspondences.

Merely because a power of attorney has been executed and the

plaint has been filed on the basis of the power of attorney does not mean that the suit cannot stand without the power of attorney. The reliance placed by the appellant, on the judgment of the Hon'ble Supreme Court in the case of *Bharat Nidhi Ltd Vs Takhatmal & others* reported in 1969 SCR (1) 595 and the judgments of Division Bench of this High Court in the case of *S.Ameer Vs.Vivek Enterprices CDJ* reported in 2004 MHC 1038 and another judgment by another Division Bench of this Court in *Yasodammal and another Vs. Janaki Ammal* reported in 1967(4) CTCOL 92 (MAD) is of no assistance.

21. Accordingly, the Writ Petition is dismissed and the judgment of the Debts Recovery Appellate Tribunal holding that the appellant is liable to pay a sum of Rs.3,59,997/- to respondent No.1 bank with interest at the rate of 9% per annum is upheld. The said amount is directed to be paid within a period of four weeks from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

// True Copy//

Sub Assistant Registrar

+1cc to Mr.L.Prabakar, Advocate Sr.No.48308
+1cc to M/s.R.Veeraragavan, Advocate sR.No.48202

VSNI(Co)
sm:6.8.2018

सत्यमेव जयते

W.P.No.9643 of 2018
and W.M.P.No.11563 of 2018

WEB COPY