

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION NO.30858 OF 2017

ORDER

(Per Hon'ble Sri Justice Sanjay Kumar)

This writ petition arises under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act'). The Export-Import Bank of India (*hereinafter*, 'the bank') sanctioned a term loan of US \$1.50 million and a Standby Letter of Credit Facility (SBLC) of US \$1.20 million, converted thereafter into working capital, under its Overseas Investment Finance Programme, to Keystone Sensors LLC, United States of America, the overseas subsidiary of Ardee Technologies Private Limited, presently known as Arrdy Engineering Innovations Private Limited, Visakhapatnam, Andhra Pradesh, the first petitioner herein, under sanction letter dated 11.02.2014. These loan facilities were extended to the subsidiary company of the first petitioner company in the United States of America for acquisition of the tangible and intangible assets of Midwest Instrument Company, USA. Thereafter, Facility Agreement dated 18.02.2014 was entered into by the bank with the petitioners herein, who offered security for the loan facilities extended to the subsidiary company of the first petitioner company. Personal guarantees were also executed by petitioners 2 to 6 in relation to these loans. The first petitioner company created a security interest over its plant, equipment and machineries in relation to these loans. The entire shareholding of the first petitioner company in the said subsidiary company was pledged with the bank. The bank also created a charge over the securities by filing a statement under the Uniform Commercial Code in the United States of America in May, 2015. Similarly, Jyoti Paper Products, the third petitioner

herein, executed an agreement pledging its entire shareholding in Keystone Sensors LLC, USA, with the bank. The second petitioner, being the Managing Director of the first petitioner, offered collateral security and registered a mortgage over his land and buildings at Parwada, Visakhapatnam, of an estimated value of Rs.2.90 Crore. A residential flat at Mumbai valued at Rs.2.00 Crore and a house property in Rourkela, State of Odisha, valued at Rs.2.78 Crore were also offered as collateral securities.

Operations of the subsidiary company in the United States of America having run into difficulties, the first petitioner company approached the bank and sought rescheduling of repayment of the term loan. The bank accepted the request and restructured the term loan under the first amendatory agreement dated 30.05.2016 to the Facility Agreement dated 18.02.2014. The petitioners mortgaged two more properties by way of Memorandum dated 26.05.2015. These properties comprised two extents of farm land, admeasuring 500 square yards each, situated in Sy.No.3/2A part of Moolakuddu Village, Rekhavani Palem Panchayat, Bheemunipatnam Mandal, Visakhapatnam District. These farm lands belonged to the second and fourth petitioners respectively. The first petitioner company obtained a 'No Objection Certificate' from the bank and sold the patents owned by Keystone Sensors LLC, USA, for about US \$ 0.21 million on 07.09.2015 and remitted the proceeds thereof to the bank in part repayment of the dues. The first instalment payable on 01.06.2016 in terms of the amendatory agreement dated 30.05.2016 was honoured but thereafter, the dues of the bank were not remitted as per the schedule. The subject loan account was accordingly declared a non-performing asset by the bank on 31.12.2016. Though the first petitioner company sold one of the mortgaged properties for Rs.2.00 Crore and remitted the proceeds of such sale to the bank towards part

repayment, the principal dues even thereafter stood in excess of Rs.12.00 Crore. In view of the default committed in repayment, the bank issued recall letter dated 27.06.2017 calling upon the first petitioner company to pay Rs.14.36 Crore within seven days, but to no avail. Demand notices under Section 13(2) of the SARFAESI Act were finally issued by the bank to the petitioners on 20.07.2017, quantifying the dues payable at Rs.14,58,25,844.45 ps. as on 13.07.2017 with further interest at 16% per annum and liquidated damages at 2% per annum from the said date. The bank called upon them to make payment of the said sum within 60 days as stipulated in the provision. The second petitioner submitted representation dated 18.09.2017 in response to the demand notice. Reply notice dated 29.09.2017 was issued by the bank justifying its action. Compliance with Section 13(3A) of the SARFAESI Act is therefore manifest. The bank thereupon initiated measures under Section 13(4) of the SARFAESI Act in relation to the some of the secured assets.

The petitioners admit that *vide* letter dated 29.12.2016, they expressed their inability to repay the balance dues of the bank though they had every intention to honour the debt. They requested the bank to dispose of the secured movable and immovable properties of Keystone Sensors LLC, USA, over which the bank had a primary lien, at the best possible price and to adjust the sale proceeds against its dues. E-mail dated 31.05.2016 was forwarded by them to the bank in this regard thereafter. Their complaint is that the bank failed to take necessary steps in relation to the properties available in the USA though a charge was created over the same under the Uniform Commercial Code in favour of the bank. The petitioners allege that the unwarranted delay on the part of the bank in invoking legal remedies against the charged properties available in the USA, over which it had a

primary lien, adversely affected and prejudiced their interests. This is the primary ground on which they filed the present writ petition alleging that there is no justifiable reason for the bank to proceed against the collateral securities/guarantors' properties when sufficient assets belonging to Keystone Sensors LLC, USA, were available for liquidation of its dues. They accordingly prayed for a direction to the bank to first dispose of the primary securities, i.e., the properties of Keystone Sensors LLC, USA, including its tangible and intangible assets located in the said country, at the best possible price and to initiate proceedings for damages/compensation against those who adversely or illegally encumbered or dealt with the said primary securities of Keystone Sensors LLC, USA; to adjust the sale proceeds and/or damages/compensation so received from out of the properties of Keystone Sensors LLC, USA, against the dues of the bank; to return, remit and transfer the balance/excess of sale proceeds/damages/compensation to the first petitioner company; not to proceed against the collateral securities and guarantees without first disposing of the primary securities belonging to Keystone Sensors LLC, USA; to withdraw and/or rescind the recall letter dated 27.06.2017 issued by the respondent; to withdraw and/or rescind the notices dated 20.07.2017 issued under Section 13(2) of the SARFAESI Act; to withdraw and/or rescind the declaration of the account of the petitioners as a non-performing asset; not to declare the petitioners as wilful defaulters; not to take any coercive measures against the petitioners during the pendency of the case; and to grant *ex parte* ad interim orders in terms of the above prayers.

The petitioners however admit that the owner of the premises in Kimberly Court, Johnson City, Tennessee State, USA, being the landlord of Keystone Sensors LLC, USA, initiated proceedings for recovery of outstanding

rentals and pursuant to the judgment granted in his favour by the competent Court at Washington, USA, on 21.09.2015, he brought the properties of Keystone Sensors LLC, USA, to sale for realisation of his dues.

Sri S.Niranjan Reddy, learned senior counsel appearing for Sri Karan Talwar, learned counsel for the petitioners, would contend that the bank, being a statutory bank established under the Export-Import Bank of India Act, 1981 (*for brevity*, 'the Act of 1981'), cannot ignore public interest and take action in relation to the loan account on commercial principles alone. He would point out that Section 5(3) of the Act of 1981 requires the Board of Directors of the bank to act on business principles with due regard to public interest while discharging its functions. Learned senior counsel would also point out that Section 6 of the Act of 1981 dealing with the constitution of the Board of Directors of the bank demonstrates the all pervasive control exercised by the Central Government in the running of the bank, thereby indicating that its functioning cannot be equated with that of a scheduled commercial bank. He would point out that the petitioners' honest endeavour to repay the dues of the bank was manifest but despite sufficient securities being available in the USA over which it had a primary charge, the bank failed to take timely action in relation thereto. He would further state that taking advantage of its own failure, the bank now wants to turn upon the petitioners, who offered collateral securities and personal guarantees. Learned senior counsel would further state that it would be open to the bank to still proceed against its primary securities in the United States of America in terms of the Uniform Commercial Code and initiate lawful steps for recovery of its dues therefrom. Learned senior counsel would concede that the bank is empowered to take recourse to the provisions of the SARFAESI Act for recovery of its dues but would assert that there was no application of

mind in terms of the law laid down by the Supreme Court in KESHAVLAL KHEMCHAND V/ s. UNION OF INDIA¹ before initiation of measures under Section 13(4) thereof.

In KESHAVLAL KHEMCHAND¹, the Supreme Court observed that the secured asset, generally the assets of an industrial concern, such as plant and machinery, etc., could be taken possession of and could either be sold or the management thereof could be taken over. Such an action, *per* the Supreme Court, if not taken after appropriate deliberation could result in disruption of industrial production and cause unemployment apart from loss of GDP, impacting larger interests of the nation. The Supreme Court further observed that all non-performing assets would not belong to the same class and such a classification is relevant and assumes importance in the decision-making process of the secured creditor as to which one of the steps contemplated under Section 13(4) should be resorted to in the case of a given defaulting borrower. The Supreme Court hastened to add that it may not be the only factor which determines the action to be taken by the secured creditor. The magnitude of the amount due and outstanding, the reasons which prompted the borrower to default in repayment, the nature of the business carried on by the defaulting borrower, the overall prospects of the defaulter's business, national and international market conditions relevant to the business of the defaulter were named as some of the factors which may be germane to such a decision.

At this stage, it may be noted that there are no pleadings in the writ affidavit to support the contention urged in the context of the above decision. Apart from the fact that there are no supporting pleadings or data put forth by the petitioners in their writ affidavit in this regard, the material

¹ (2015) 4 SCC 770

sought to be placed on record by way of an amendment petition, which was neither argued nor ordered, indicates that the measures taken by the bank as on date are only against residential properties or farm lands. No action seems to have been initiated by the bank under Section 13(4) in relation to the collateral securities, such as plant & machinery/equipment, offered by the first petitioner company. It is therefore wholly premature for this Court to assume that the bank would fail to apply its mind before taking recourse to one of the options available to it under Section 13(4) in relation to the business assets of the first petitioner company. The argument advanced by the learned senior counsel in this regard is therefore without merit and is accordingly rejected.

It may be noted at this stage that the petitioners put forth several reasons for the failure of the business venture floated by the first petitioner company through its overseas subsidiary company, Keystone Sensors LLC, USA. They also furnished details of the stringent efforts made by them to repay at least part of the amounts due to the bank. However, these details are of no relevance. Once it is admitted that, be it for whatever reason, the loan account in question was not operated regularly and was consequently declared a non-performing asset, and as the bank admittedly has the power to take recourse to the SARFAESI Act for recovering its dues, initiation of proceedings thereunder by the bank cannot be questioned or challenged on the ground that the petitioners have genuine reasons to account for the failure of the business venture. Ultimately, the bank, even if it is under the control of the Central Government, is a commercial undertaking and would be fully entitled to take all lawful measures to recover its dues in public interest. The larger public interest in this regard would therefore be in the bank recovering its dues and not in its delaying possible measures for

recovery on the ground that the defaulting borrower had genuine reasons for failing to repay the dues.

Another contention urged by Sri S.Niranjan Reddy, learned senior counsel, is that the guarantees offered by the petitioners in relation to the subject loan account stood discharged under Sections 140 and 141 of the Indian Contract Act, 1872 (*for brevity*, 'the Act of 1872'). These legal provisions read as under:

'140. Rights of surety on payment or performance.- Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. Surety's right to benefit of creditor's securities.- A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.'

Learned senior counsel would assert that as the bank failed to take timely measures in relation to the primary securities available in the United State of America belonging to Keystone Sensors LLC, USA, it lost such securities and in the light of Section 141 of the Act of 1872, the guarantors would stand discharged to the extent of the value of the lost security.

This argument is countered by Sri R.Raghunandan, learned senior counsel appearing for Sri K.Siddhartha Rao, learned counsel for the bank, by pointing out that in terms of the general conditions forming part of the Deed of Guarantee dated 18.02.2014, the guarantee would not be affected by any loss of security or any laches on the part of the bank in preservation of the security (Clause 10(vi) at Page 2 of the Annexure to the Deed of Guarantee dated 18.02.2014). It appears that similar Deeds of Guarantee were executed by all the petitioners. Learned senior counsel would further point out that no plea was raised in this regard in the writ affidavit and, therefore,

the bank had no possibility to rebut the same in writing in its counter affidavit.

This Court finds merit in the stand taken by the bank. Without sufficient pleadings being advanced in the first instance, the petitioners cannot seek to build up a case like castles in the air. It was only after the bank filed its counter affidavit that the petitioners came up with a petition seeking to amend their pleadings and prayer in this writ petition. However, as already stated earlier, this amendment petition was neither argued nor ordered and the contents thereof do not form part of the record as on date. Further, even if Section 141 of the Act of 1872 has application, it would only discharge the guarantors to the extent of the value of the security lost. No material has been placed before this Court as to what was the value of the securities allegedly lost in the United States of America. To compound matters further, the petitioners willingly entered into a written agreement contrary to the provisions of Section 141 of the Act of 1872. A contract would ultimately boil down to the terms of the agreement and the *consensus ad idem* between the parties thereto. The question would therefore arise as to whether Section 141 would have any role to play at all, when a contrary term was specifically agreed to by and between the parties in their written Deed of Guarantee.

Sri S.Niranjan Reddy, learned senior counsel, would contend that even if the Deed of Guarantee is taken into account, it would be hit by Section 23 of the Act of 1872. We are not impressed. Section 23 deals with the lawfulness or otherwise of consideration and objects in relation to contracts. The consideration or object of an agreement is unlawful thereunder if it is forbidden by law; or if it is of such a nature that, if permitted, it would defeat the provisions of any law; or if it is fraudulent; or if it involves or implies,

injury to the person or property of another; or if the Court regards it as immoral or opposed to public policy. Section 141 of the Act of 1872 has no effect presently given the contrary terms of the agreement, referred to *supra*, agreed upon by the petitioners and the bank. We have already pointed out that larger public interest lies in the bank recovering its dues. This Court therefore finds no merit in the contention of the learned senior counsel.

Apart from what has been discussed hereinabove, it may be noted that the petitioners, in their own wisdom, offered collateral securities and stood as guarantors for the loan facilities extended by the bank to Keystone Sensors LLC, USA, the overseas subsidiary of the first petitioner company. They therefore satisfy the requirements of the definition of 'borrower' under Section 2(f) of the SARFAESI Act. That being so, they cannot seek to draw a distinction between themselves, on the one hand, and the principal borrower, Keystone Sensors LLC, USA, on the other. Further, and more significantly, the settled legal position is that the liability of a guarantor is coextensive with that of the primary borrower. The judgments of the Supreme Court in *INDUSTRIAL INVESTMENT BANK OF INDIA LTD V/ s. BISWANATH JHUNJHUNWALA*², *UNITED BANK OF INDIA V/ s. SATYAWATI TONDON*³ and *CENTRAL BANK OF INDIA V/ s. V.L.VIMLA*⁴ clearly affirm this principle. The petitioners, in the capacity of guarantors, therefore cannot dictate to the bank as to in what preferential order it should proceed, i.e., against the principal borrower first or the guarantors, for recovering its dues. It is wholly within the discretion of the bank to decide as to whether it should first proceed against the principal borrower or against the guarantors. In the light of this settled legal position,

² (2009) 9 SCC 478

³ (2010) 8 SCC 110

⁴ (2015) 7 SCC 337

the prayer of the petitioners that the bank should first take action against the primary securities of the principal borrower, Keystone Sensors LLC, USA, and only thereafter take recourse to realisation of its dues from the collateral securities/guarantees, cannot be countenanced. The very substratum on which the petitioners seek relief therefore stands demolished.

On the above analysis, this Court finds no merit in this writ petition which is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

2nd JULY, 2018

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