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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 91/2018 & IA No. 2698-2699/2018**

SANJEEV SRIVASTAVA & ANR. Petitioners

Through: Mr Vikas Singh, Senior
Advocate with Mr Keshav
Mohan, Mr Rishi K. Awasthi
and Ms Ritu Arora, Advocates.

versus

**IDBI TRUSTEESHIP SERVICES LIMITED
& ORS.** Respondents

Through: Mr Darpan Wadhwa, Senior
Advocate with Ms Ranjana Roy
Gawai, Ms Vasudha Sen and
Mr Arjun Asthana, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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01.03.2018

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying for setting aside the arbitral award dated 23.11.2017 (hereafter 'the impugned award') rendered by the Arbitral Tribunal. The impugned award was rendered in the context of the disputes that had arisen in respect of the Personal Guarantees issued by the petitioners for due repayment of loans availed by Assotech Limited (hereafter 'Assotech') by issue of debentures.

2. By the impugned award, the Arbitral Tribunal has held that the petitioners (along with Shri Manoj Shrivastava) are jointly and severally liable to pay an aggregate sum of ₹25,57,00,000/-to

respondent no.1 (hereafter 'IDBI'). Further the petitioners have also been held to be jointly and severally liable for payment of interest at the rate of 10% per annum on the principal amount of ₹22,06,00,000/- with effect from 16.02.2017 till the date of realisation of the amount.

3. Assotech is a company engaged in the business of construction and development of real estate. Assotech entered into a Debenture Subscription Agreement (hereafter 'DSA') with three lenders (subscribers) for raising funds for meeting expenses in respect of its various real estate projects, repayment of loans and payment of dues to NOIDA (New Okhla Industrial Development Authority). In terms of the said DSA, the three subscribers – namely, Zee Entertainment Enterprises Limited, Hindustan Composites Limited and Essel Finance Advisors and Manager LLP – subscribed to 4500 fully secured redeemable non-convertible debentures of a face value of ₹1,00,000/- each; Zee Entertainment Limited subscribed to 2900 debentures, Hindustan Composites Limited subscribed to 300 debentures and Essel Finance Advisors and Manager LLP subscribed to 1300 debentures. Thus, in aggregate, the three subscribers lent a sum of ₹45 crores to Assotech.

4. On 29.03.2014, Assotech executed a Debenture Trust Deed with IDBI (IDBI Trusteeship Services Limited – respondent no.1) to act for the benefit of the subscribers of the 4500 non-convertible debentures issued by Assotech. Petitioner no.1, who was the Managing Director of Assotech at the material time, as well as two other Directors (including petitioner no.2) executed personal guarantees in favour of

IDBI.

5. IDBI issued a notice of demand on 01.04.2016 on Assotech as well as on the guarantors – namely, the petitioners and one Mr Manoj Srivastava – calling upon them to discharge the dues payable under the DSA. There is no dispute that Assotech defaulted in due discharge of its liability under the DSA.

6. Since the said payments were not made, IDBI invoked the arbitration clause and the Arbitration Tribunal was constituted.

7. IDBI filed its statement of claim on 15.07.2016 and the petitioners filed their statement of defence on 16.09.2016.

8. It appears that while the arbitral proceedings were pending, IDBI and Assotech agreed on an arrangement (hereafter ‘the said arrangement’), whereby Assotech agreed that the amounts received from specified real estate projects (named as Nest and Windsor) would be deposited in an escrow account. And, only a specified percentage of the receipts – 77% in case of receipt from Nest and 86% in case of receipts in respect of Windsor – would be utilised by Assotech from the said project and the balance would be available for discharging the dues under the DSA.

9. In the arbitral proceedings, the petitioners filed an affidavit on 10.07.2017; but, the said arrangement was not disclosed in the aforesaid affidavit as well. However, during the cross-examination of petitioner no.1, which was conducted on 06.10.2017, he referred to the

said arrangement. He also sought to canvas that the petitioners were discharged from their obligations under the personal guarantees on account of IDBI entering into the said arrangement with Assotech (the principal debtor) without their express consent.

10. The petitioners also filed the written submissions before the Arbitral Tribunal on 09.11.2017, *inter alia*, contending that in terms of Section 135 of the Indian Contract Act, 1872 (hereafter ‘Contract Act’), the petitioners were discharged from their obligations under the DSA, as IDBI had entered into the said arrangement with Assotech for recovering the dues under the DSA.

Submissions

11. Mr Vikas Singh, the learned Senior Counsel appearing for the petitioners contended that the impugned award was patently erroneous, as the Arbitral Tribunal had failed to consider the petitioners’ contention that they were discharged of their obligations under their Personal Guarantees by virtue of Section 135 of the Contract Act. He contended that the Arbitral Tribunal had erred in faulting the petitioners for not bringing the said arrangement to the notice of the Arbitral Tribunal at the material time. He submitted that this view was erroneous, as the duty to make full disclosure rested with IDBI as it was the claimant before the Arbitral Tribunal.

Reasons and Conclusion

12. There is no dispute that the petitioners had executed personal

guarantees for due discharge of Assotech's liability towards the lenders. It is also well settled that the liability of a surety is co-terminus with the liability of the principal debtor. Thus, there is no infirmity with the Arbitral Tribunal holding the petitioners to be jointly and severally liable for the liability of Assotech under the DSA.

13. The principal controversy that falls for consideration of this Court is whether the decision of the Arbitral Tribunal to not examine the petitioners' contention that they were discharged by virtue of the said arrangement renders the impugned award susceptible to challenge under Section 34 of the Act.

14. There is no dispute that the petitioners were fully aware of the said arrangement at the material time but had taken no steps to amend their Statement of Defence, which was filed prior to Assotech and IDBI entering into the said arrangement. Concededly, the first time any reference was made to the said arrangement was during the cross-examination of petitioner no.1. The contention that the petitioners were discharged from their obligations as guarantors on account of Assotech and IDBI entering into the said arrangement also finds place in the written submission filed on behalf of the petitioners before the Arbitral Tribunal.

15. This Court is of the view that since the petitioners had failed to take the appropriate steps to amend the Statement of Defence, the Arbitral Tribunal cannot be faulted for not considering the same. Concededly, all the grounds urged by the petitioners in the Statement

of Defence have been considered by the Arbitral Tribunal.

16. The contention that it was incumbent upon IDBI to disclose the said arrangement before the Arbitral Tribunal and the Arbitral Tribunal was obliged to consider its effect, is unpersuasive. The fact that Assotech and IDBI had entered into the said arrangement was within the knowledge of the petitioners and it was for them to urge the same in their defence to the claims, if they so desired. Having failed to amend their Statement of Defence, it is not open for the petitioner to contend that the Arbitral Tribunal was obligated to consider such defence. Thus, this Court finds no ground to interfere with the Arbitral Tribunal.

17. Having stated the above, it is also relevant to state that the defence sought to be urged by the petitioners – that is, that they are discharged as guarantors on account of Assotech entering into an arrangement with IDBI – is also unmerited. The Personal Guarantees furnished by the petitioners specifically provided that any arrangement entered into between the principal debtor and the creditors would not absolve the petitioners (guarantors) of their liability under the Guarantees. Clause 5.1.5 of the Personal Guarantees is set out below:-

“5.1.5 The Debenture Trustee shall have the full liberty, without notice to the Guarantors and without in any way affecting this Guarantee, to exercise at any time and in any manner any power or powers reserved to the Debenture Trustee under the Debenture Documents, to enforce or forbear to enforce payment of the Secured Debenture Obligations payable to the

Finance Parties under the Debenture Documents or any part thereof or interest or other monies due to the Debenture Trustee from the Issuer or any of the remedies or securities available to the Debenture Trustee, to enter into any composition or compound with or to grant time or any other Indulgence or facility to the Issuer/to give/grant temporary or extra overdrafts or other advances/credit facilities to the issuer and the Guarantors shall not be released by the exercise by the Debenture Trustee of their liberty in regard to the matters referred to above or by any act or omission on the part of the Debenture Trustee or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantors and the Guarantors hereby waive in favour of the Debenture Trustee so far as may be necessary to give effect to any of the provisions of this Guarantee, all the suretyship and other rights which the Guarantors might otherwise be entitled to enforce and the Guarantors hereby irrevocably and unconditionally waive all rights and remedies available to a guarantor in law, contract or in equity or otherwise howsoever and particularly those provided in sections 132, 133, 134, 135, 136, 137, 138, 139 and 141 of the Indian Contract Act, 1872.”

18. The petitioners having specifically waived the right to claim any discharge by virtue of Section 135 of the Contract Act cannot be permitted to urge this defence. Thus, notwithstanding that the Arbitral Tribunal cannot be faulted for not considering this defence, the claim of the petitioners that they are discharged by virtue of Section 135 of

the Contract Act is plainly unmerited and cannot be accepted (see **T. Raju Setty v. Bank of Baroda : AIR 1992 Kant 108**; also see **State Bank of India v. Dharam Kumar & Anr. (1998) 2 MLJ 774**).

19. Mr Singh did not dispute the aforesaid position either. He, however, stated that it would always be open to the petitioners to challenge the Clause 5.1.5 of the Personal Guarantees on the ground that it was a standard format clause and was unconscionable. The said contention is also bereft of any merit.

20. In view of the above, this Court finds no ground to interfere in the impugned award. The petition is, accordingly, dismissed. The pending applications also stand disposed.

MARCH 01, 2018
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VIBHU BAKHRU, J