IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11540 OF 2018

Mahabir Prasad Golyan .. Petitioner
Versus
Indian Bank and Anr .. Respondents

Mr.Atul Damle, Sr. Advocate with Mr.Sahl Mahajan, Mr.Puneet Arora, Mrs.Punita Arora, I/b M/s.Arora & Co. for the petitioner.

WITH
WRIT PETITION NO. 1440 OF 2018
(ORDINARY ORIGINAL CIVIL JURISDICTION)

Krishan Kumar Golyan .. Petitioner
Versus
Indian Bank and 2 ors .. Respondents

Mr. C.P. Vig h/f. T.N. Tripathi & Co. for the Petitioner.

**CORAM: PRADEEP NANDRAJOG, C.J.
AND BHARATI DANGRE, J.**

DATED : 18th NOVEMBER, 2019

P.C:- (Per Smt.Bharati Dangre, J)

1 Since the two Writ Petitions revolve around identical facts and assail the identical orders passed by the Debt Recovery Appellate Tribunal, they were heard together and disposed of by common order.

2 The facts involved in the two Writ Petitions are straight and simple. The borrower company M/s.Vidarbha Phosphate & Fertilizers Limited having its registered office at 126, Vijay Nagar, Chhaon, Nagpur and a Corporate office at Nulon House Ishwar Nagar, New Delhi was sanctioned a cash credit limit of Rs.50 lakhs on 29th March 1988 by the Indian Bank. This limit was subsequently enhanced to Rs.100 lakhs. The borrower Company thereafter availed various credit facilities from the Indian Bank in form of open cash credit (OCC), draft/Book Debt (ODBD), Overdraft/Government Subsidy, Inland L.C, Guarantees, etc. On or about 21st April 1990, the borrower Company requested for enhancement of the facilities, working capital facility and the term loan limit. In lieu thereof, the borrower executed various documents in form of security for the facilities availed. By way of colateral security, an agreement of guarantee dated 13th June 1991 was executed by Shri Mahavir Prasad Golyan, Chairman and Managing Director of the borrower company. Another agreement of guarantee dated 22nd May 1992 was executed by Krishna Kumar Golyan, the director of the borrower company. Mahavir Prasad Golyan is the petitioner before us in Writ Petition No.11540 of 2018 and Krishna Kumar Golyan is the petitioner in Writ Petition No.1440 of 2018.

3 The account of the borrower became irregular and on an allegation that the Company receiving a substantial amount of Rs.1,30,47,122/- towards subsidiary during the period from 4th June 1993 to 9th July 1993 from FICC, New Delhi, it was alleged that the subsidy amount was utilized and adjusted by the borrower towards satisfaction of unsecured loan and other creditors with an ulterior motive of defrauding the lender bank. The borrower company on 6th April 1994 acknowledged its indebtness to the bank in the sum of Rs.4,77,054.45 being balance outstanding in various facilities as on 28th February 1994. However, since the guarantors of the Company declined to acknowledge their indebtness, the bank instituted a Special Civil Suit in the Court of Civil Judge, Sr. Division, Nagpur for recovery of the said amount from Respondent Nos.2 and 3 therein i.e. the guarantors. The amount claimed in the suit was to the tune of Rs.5,14,89,577.59 with interest @ 21% p.a. meant for enforcement of the hypothecated securities. The said Suit was filed during continuation of the statutory reference before the BIFR. The defendants denied their liability as guarantor by filing written statement in the said suit.

4 The borrower company was wound up by an order passed by the Hon'ble High Court on 3rd October 1997 on rejection of the reference under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. On

enactment of the Recovery of the debts due to Banks and Financial Institutions, Act 1993, the Civil Suit came to be transferred to DRT, Nagpur and was registered.

5 The petitioners (defendant nos.2 and 3) filed common written statement and raised all possible pleas to stall the Bank from proceedings against them for the default of the principal debtor. A plea was raised at the outset about limitation. It was alleged that the O.A is bad for misjoinder of cause of action and it was also assailed to be bad in view of Section 22 of the The Sick Industrial Companies (Special Provisions) Act, 1985. Attack was also mounted on the territorial jurisdiction of the Tribunal on the ground that the defendants are residing in Delhi. In the way of opposing the O.A filed by the Bank, left, right and center, a defence was also taken that the signatures on the documents were taken on blank paper and the bank obtained Power of Attorney from the borrower company. The discharge was also claimed on the ground that the Bank on its own and without giving information to the defendant remitted an amount of Rs.2,68,19,882/- on 11th January 1994 to Industrial Bank by debiting the OCC account. By an amendment carried out in 2005, the discharge was claimed on the ground that the bank gave undertaking to the Official Liquidator that in consideration of Rs.15,42,752/-, it will not proceed against the Official Liquidator. Taking this document as the sheet anchor of the

defence, it was urged that since the Bank has discharged the borrower, the guarantors also claimed that they stood discharged.

6 The DRT, Nagpur by its judgment dated 30th May 2005 rejected all the contentions and directed the defendant Nos.2 and 3 to pay to the applicant Bank an amount of Rs.4,29,99,311.57 with interest @ 12 % p.a. from 6th April 1994 till full realization. The O.A was thus allowed with costs against the defendant Nos.2 and 3 though it was rejected qua the defendant no.1 – principal borrower. Recovery certificate was directed to be issued accordingly.

The said judgment came to be challenged before the Debt Recovery Appellate Tribunal through Appeal No.436 of 2006. The DRAT dismissed the Appeal by the impugned order dated 31st October 2017 and it dealt with the two objections substantially raised i.e. bar of Section 22 of the SICA and the second objection claiming discharge in terms of Section 134 of the Contract Act.

The present Writ Petitions assail the said order passed by the DRAT concurring with the judgment dated 30th May 2006 delivered by the DRT, Nagpur.

7 As far as the objection under Section 22 of the Sick Industries Company (Special Provisions Act, 1985) is concerned, a concurrent finding is recorded that the Tribunal has not

proceeded with the Suit or the O.A during the pendency of the BIFR proceedings and rather the O.A was decided after a lapse of two years from the date of rejection of the reference by BIFR and in light of the said fact, the consent of BIFR was not warranted.

This brings us to the second contention of the appellant to the effect that they stand discharged in terms of Section 134 of the Indian Contract Act and the recovery certificate granted against them is not tenable. The contention is that once the principal borrower is discharged, the appellant being the guarantors are automatically discharged from their liability and fault is found in both the impugned orders when the said contention of the appellants did not find favour.

The Indian Contract Act through Section 128 provides for the liability of surety to be co-extensive to that of the principal debtor unless it is otherwise provided by the contract of guarantee. In such a contingency, a surety may limit or restrict his liability by contract. Therefore, at this juncture, it would be appropriate for us to refer to the agreement of guarantee executed by the appellants as 'guarantors' in favour of the Indian Bank referred to as 'Bank' executed in consideration of the Bank allowing/continuing/enhancing at the request of the guarantor(s) various banking facilities in favour of Vidarbha Phosphate & Fertilizers Limited i.e. the principal borrower on the terms and conditions stipulated therein. By the said agreement, the guarantors offered the guarantee to the Bank jointly and severally to pay on demand all principal, interest, costs, charges and expenses due and which may at any time become due to the Bank from the borrowers on the account opened in respect of the said limits down to the date of payment and also all loss of damages, costs, charges and expenses. The guarantee was termed to be a continuing one and not to be considered as acknowledged by the fact that the said accounts may show no liability against the borrower or may even show a credit in his favour but it shall continue to be the guarantee and remain in operation in respect of all subsequent transactions. The recital contained in clause (4) of the said deed bears a significance and reads thus :-

> *"4 The Guarantors hereby consent to the Bank making any variance that it may think fit in the contract with the Borrowers, to the Bank accepting additional or collateral security of any kind determining, enlarging or varying any credit to him or making any composition with him or promising to give him time or not to sue him and to the Bank parting with any security it may hold for the guarantees debt. The Guarantors also agree that they shall not but discharged from their liability by the Bank realizing the Borrower or by any act or omission of the Bank the legal consequences of which may be to discharge the Borrower or by any act of the Bank which would, but for this present provision, be inconsistent with their rights as Guarantors or by the Bank's omission to do any act which but for this present provision, the Bank's duty to the Guarantors would have required the Bank to do Through as between the Borrower and the Guarantors only, the Guarantors agree that as between the Bank and the Guarantors they are debtors jointly with the Borrower and accordingly they shall not be*

> *entitled to claim the benefit or legal consequences of any variation in the terms of the contract and to any of the rights conferred on a Guarantor by Section 133, 134, 135, 139 and 141 of the Indian Contract Act.*

8 At this very stage, it would be apposite to refer to the communication which is the fulcrum of the argument of the guarantor and forms the basis for the claim that the guarantors stand discharge in light of the said communication. The Branch Manager of the Indian Bank on 18th June 2003 has addressed a communication to the Official Liquidator which reads thus :-

> *"To,*
>
> *The Official Liquidator*
> *High Court,*
> *NAGPUR*
>
> *Subject : DRT A/c M/s. Vidharbha Phosphates & Fertilizers Pvt.. Ltd (Under Liqidation)*
>
> *Please refer our meeting on 29/5/2003 with you at your Chamber in the matter. As per our discussions with you we submit our undertaking as below :*
>
> *"In consideration of the payment of Rs.15,42,752/- made by the Official Liquidator of M/s.Vidarbha Phosphates and Fertilizers (In liquidation) In respect of the securities charged to the Bank and sold by the Official Liquidator as per the orders of High Court, Mumbai (Nagpur Branch) we do hereby give our undertaking that we shall not proceed against M/s. Vidarbha Phsphages & Fertilizers Pvt.Ltd (In Liquidation) through the official liquidator appointed by the Hon. Court in the company petition No.2 of 1996 in the proceedings filed by the Bank against the company and others before DRT, Nagpur in O.A. No.150/2001.*

However, our claim against M/s.Vidarbha Phosphates & Fertilizers Ltd (In Liquidation) shall continue as provided in Section 529(A) of the Company's Act as preferential claim till the dues of the Bank are satisfied duly".

In view of the above kindly make the payment of our share at the earliest.

Yours faithfully,

Branch Manager"

9 On the basis of the aforesaid letter by which the Indian Bank has conveyed to the Official Liquidator that the Bank undertook that it shall not proced against the principal debtor through the Official Liquidator in the proceedings filed by the Bank against the Company and others before the DRT, Nagpur in the O.A. The submission is that the term "and others" discharge the surety and no claim survives against them in light of Sections 134 and 135 of the Contract Act.

10 The said submission, in our considered view is without any substance. Under Section 134, surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor has released or by any act or omission of the creditor, the legal consequences of which is the discharge of the principal debtor. It thus postulates an existence of a contract between the creditor and the principal debtor, which has the effect of releasing the principal debtor or by any act of the

creditor which has the effect of discharging the principal debtor, the surety is discharged. The underlying principle of the said provision is that when a creditor unconditionally releases the principal debtor, this release extinguishes the principal obligation. A guarantor can be discharged from his liability either by express terms or he may be discharged as a result of the legal consequences of an act or omission. The contract of guarantee is an independent transaction containing independent and reciprocal obligations and it is on principal to principal basis and that is the reason why the Indian Contract Act has provided both the creditor and the guarantor some reliefs. The terms of the contract of guarantee would determine the contingency of discharge of a surety and on perusal of the terms of the guarantee agreement, it do not provide for any contra note, pertaining to the liability of the surety which create an exception within the meaning of Section 128 of the Contract Act.

11 In Maharashtra State Electricity Board Vs. Official Liquidator, AIR 1982 S.C 1497, while dealing with a Company which faced liquidation and which was ordered to be wound up, the bank wrote to the Liquidator indicating the Companies liability to the Bank to the extent demanded by the Board and the Liquidator moved an application under Section 156(2) of the Companies Act praying for an order restraining the Board from realizing the amount covered by the guarantee on the ground that

in view of the winding up, the Board could not claim guaranteed amount from the Bank.

12 In the backdrop of the said facts, it was held that the bank's liability is co-extensive with that of the principal debtor though under Section 134 of the Contract Act, Bank is discharged by release or discharge of the principal debtor, but a discharge which the principal debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a Company does not absolve the surety of his liability.

13 The appellant is neither entitled to claim benefit of Section 135 which comes into picture when the contract between creditor and principal debtor by which the creditor makes a composition with or promises to give time to or not to sue, the principal debtor discharge the surety unless the surety assents to such contract. It provides for a contingency where the creditor does something behind the back of the surety and does it to its prejudice, which is likely to cause harm to the surety, the surety is not bound by the undertaking of the creditor. On existence of such a contract between the creditor and principal debtor made without surety's consent, the surety stands discharged. None of the contingencies as stipulated under Section 134 or Section 135 has been established. In light of clause (4) of agreement of guarantee, the invocation of these two provisions by the appellant

as a guarantor stands completely excluded. By virtue of the said covenant in the Deed of Guarantee, rights available under Section 133 to 135 have been waved. The reliance placed by the appellant on the judgment in case of *Waman Shriniwas Kini Vs. Ratilal Bhagwandas & Co, AIR 1959 SC 689* was found to be inapplicable and rightly so, since the Bank had received the sum of Rs.15,42,752/- from the borrower company, it was realized by sale of assets belonging to the Company under liquidation on which the Bank was having charge and since there were as many as 91 claims over the very same Company from different banks and the Official Liquidator recommended distribution of sale proceeds and the Bank got its share of 3.08 of the sale proceeds on pro-rata basis, the discharge of the principal borrower would not automatically discharge the appellants in the wake of the specific clause contained in the agreement of guarantee. In light of the aforesaid factual scenario, the appellants being bound by the agreement of guarantee which is an independent contract/transaction, we do not feel that the Writ Petitions filed by the petitioners deserve a consideration and hence are dismissed.

SMT. BHARATI DANGRE, J **CHIEF JUSTICE**

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