IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.89 OF 2019
IN
ARBITRATION PETITION NO.505 OF 2017

1. (a) Pramila H. Thacker (Wife)]
(b) Apurv H. Thacker (Son)]
(c) Heena H. Thacker (Daughter)]
(d) Purvi H. Thacker (Daughter)]
legal heirs of Mr. Hasmukh B. Thacker,]
residing together at A/2-14, Bhanu Co-op]
Housing Society L.B.S. Marg, Mulund (west).]

2. Bhavesh J. Thacker,]
Guarantor No.1,]
Residing at B/603, Geeta Arcade No.4,]
Mira Road (East),]
Opp. Church 5th Road,]
Thane-401 107.]

3. Jatin Dilip Somaiya,]
Guarantor No.2,]
Residing at: A/704, Harmony Building,]
Off. Dumping Road, opp. Pournima Building,]
Tmabe Nagar, Mulund (west),]
Mumbai-400 080.]..Appellants
(Org. Petitioners)

Versus

Abhyudaya Co-op. Bank Ltd.]
Having its administrative office at]
K. K. Tower, Abhyudaya Bank Lane,]
Off. G.D. Ambekar Marg, Parel Village,]
Parel, Mumbai-400 012.]..Respondent
(Org. Respondent)

Mr. Arif Doctor a/w Ms. Alvia Crasta I/by Manoj Khatri, Advocate for the Appellants.
Mr. Madhur Rai I/by PRS Legal Advocate for the Respondent.

CORAM : PRADEEP NANDRAJOG, C.J. &
NITIN JAMDAR, J.

RESERVED ON : 30th JULY 2019.
PRONOUNCED ON : 1st AUGUST 2019.

JUDGMENT (Per Pradeep Nandrajog, C.J.)

1] Appellant Nos.1(a) to 1(d) are the legal heirs of late Hasmukh B. Thacker. He was the principal borrower. The Appellant No.2 is the younger brother of Hasmukh B. Thacker and was the guarantor. Appellant No.3 is the other guarantor.

2] Challenge in the Appeal is to the order dated 30th October 2018 dismissing objections filed by the Appellants to an Award dated 9th March 2017.

3] Late Hasmukh B. Thacker was a member of the Respondent which is a Multi-State Scheduled Co-operative Bank. He had availed credit facilities through the Bank. Appellant No.2 and 3 had stood as guarantors. As on 04.02.2013, ₹ 49,04,214.23 was outstanding. The principal borrower had died on 29.08.2012. Claim Petition was filed pleading that ₹ 49,04,214.23 was outstanding. It was pleaded that after the death of the borrower since his legal heirs were not paying the outstanding amount, collateral securities in the form of Fixed Deposits were encashed and adjusted. After adjusting the said amount, ₹ 49,04,214.23 was outstanding.

4] In the written statement filed by the legal heirs of the principal borrower, they raised an issue of the Bank not assigning credit facility to them. They admitted that the Fixed Deposits by the borrower offered as collateral security was adjusted by the Bank. They did not dispute that the hypothecated goods were in their possession.

5] The stand taken by the guarantors was that the Deed of Hypothecation required the hypothecated goods to be sold and if any amount remained outstanding only then claim could be made against them. They pleaded that the bank was negligent in not taking possession of the hypothecated goods. The award was published by the Arbitrator on 30th August 2013 decreeing the claim and ordering that the amount would be realized from the sale of even the personal properties of the legal heirs of the principal borrower. The award was set aside on 23rd January 2015 and matter was remanded to the Arbitrator for fresh adjudication. Award was published again on 9th March 2017. Claim was decreed. Once again it was held that the award would be satisfied from the personal assets of the legal heirs. Vide the impugned order dated 30th August 2013 said part of the award has been set aside and the remainder has been upheld.

6] From the Award and the decision of the Learned Single Judge which has upheld the Award with modification as noted above, it emerges that the entries in the statement of account relied upon by the Bank were not disputed.

7] On the issue of the hypothecated stock, the reply filed by the legal heirs of the principal borrower disputed the stock in trade of the deceased being in their possession and control, but relevant would it be to note that they never pleaded what happened to the stocks held by Hasmukh B. Thacker when he died. As regards the Guarantors, they admitted collateral securities being adjusted and relevant would it be to highlight it was never pleaded that due to any inaction by the bank the hypothecated properties have been lost. On the contrary the plea is that the bank must proceed firstly against the hypothecated properties.

8] Learned counsel for the guarantors relied upon clause 11 and 12 of the Deed of Hypothecation which read as under:

> *"11. It shall be lawful for the Bank at any time after taking possession of the Hypothecated Assets (without prejudice to the Bank's right of suit/application for recovery or any other right against the Borrower) to recover, receive, appoint receivers of or remove and/or sell either by public auction or private contract after giving 2 days notice subject to such conditions as the Bank shall think fit or otherwise dispose of, deal with at any time or times, the Hypothecated Assets or any part*

or parts thereof and/or to enforce, realize, settle, compromise and to deal with any rights or claims regarding any of the Hypothecated Assets without being bound to exercise or non-exercise thereof and notwithstanding that there may be any pending suit or other proceedings, the Borrower/s undertake/s to transfer and deliver to the Bank all relative contracts, securities, bills, notes, hundies and documents and any and all acts of the Bank in this regard shall be binding on the Borrower/s.

12. The Bank shall apply the sale proceeds towards the Cash Credit account to the extent of the balance due to the Bank or so much thereof as shall remain unpaid including interest at the rate of aforesaid until payment and including all costs as between Attorney and Client, charges and expenses incurred by the Bank on any account whatsoever. If the net sum realized by such sale were insufficient to cover the balance due to the Bank, the Borrower shall be liable forthwith on production to the Borrower, a statement prepared by the Bank to pay the balance due to the Bank. The Borrower/s agree/s that the hypothecated assets and any documents and any sale proceeds received by the Borrower/s on the sale in the ordinary course of business and any insurance *monies received by them, shall be held by them in trust for the Bank as specifically appropriable to this security till such monies are deposited in the said account and the Borrower/s undertake to deposit such monies in the said account only and not to use the same for any other purpose, unless permitted by the Bank in writing. The Borrower/s further undertake/s that the Borrower/s will not create or suffer or attempt to create or suffer any mortgage, charge, lien, encumbrance, attachment or seizure affecting the hypothecated assets or any part thereof nor do or allow anything which prejudice the security hereby created. The security shall be operative and remain in full force till all the dues together with interest of the Borrower are fully paid to the Bank."*

9] We fail to understand how said two clauses help the guarantors with respect to their plea that under Section 139 of the Contract Act they stand discharged. Section 139 of the Indian Contract Act, 1872, which reads as under :-

*"**139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.** - If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor*

is thereby impaired, the surety is discharged."

10] As per the Section the surety is discharged if the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which injures the surety. In the instant case merely because the Bank did not proceed to take possession of the hypothecated goods and left them in the custody of the legal heirs of the principal debtor, would not amount to an act of commission or omission impairing the right of the surety. Clause 10 of the Deed of Guarantee contains a disclaimer. The said clause reads as under:

> *"10. The Guarantors hereby consent to the Bank making any variance, change or modification that the Bank may think fit in terms of the Bank's contract with the Borrower; to the Bank determining enlarging or varying any credit facility to the Borrower; to the Bank making any composition with or promising to give time or installments to the Borrower or not sue the Borrower or to the Bank's parting with any security which it may be holding for the guaranteed credit facilities. The Guarantors also agree that they shall not be discharged from their liability to the Bank by Bank releasing the Borrower or by any act or omission of the Bank as indicated above, the legal consequences whereof may be to discharge the Guarantors or by any act of the Bank*

which would, but for this provision be inconsistent with the Guarantors rights as sureties or by any act of Bank's omission to do any act which, but for this presents provisions, the Bank's duty to the Guarantors would have required the Bank to do. The Guarantors do hereby waive all the rights available to the Sureties under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act. The Guarantors also agree that they will not be entitled to the benefit of subrogation to the securities until and unless all monies due to the Bank secured by such securities are fully re-paid and also if the same securities are held by the Bank for any other indebtedness of the Borrower."

11] There is no merit in the Appeal which is dismissed.

NITIN JAMDAR, J **CHIEF JUSTICE**