

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.11.2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

Original Side Appeal No. 100 of 2019
and
C.M.P. No. 9407 of 2019

State Bank of India Limited
No.18/3, Sigappi Achi Building
Rukmini Lakshmipathi Road
Egmore, Chennai - 600 008
rep. by its Chief Manager

.... Appellant

Versus

1. M/s. Concorde Residential Schools Kerala Pvt Ltd.,
rep. herein by its Authorized Signatory
TC 24/53, Post Box NO.7
Opp. Secretariat, MG Road
Thiruvananthapuram
Kerala - 695 001

2. M/s. ICICI Bank Limited
1, Cenotaph Road, Teynampet
Chennai - 600 018
rep. by its Chief Manager

3. Axis Bank Limited
192, Karumuttu Nilayam
Anna Salai, Chennai - 600 002
rep. by its Chief Manager

4. Everonn Education Limited
5. Edification India Limited
6. Everonn Skilling India Limited
7. Everonn Schools Limited

4 to 7 are at
'Capital Towers'
Unit Nos. 203 & 204
II Floor, New Door Nos. 6/13 & 6/14
Kodambakkam High Road
Dr. M.G.R. Salai, Nungambakkam
Chennai - 600 034

... Respondents

Original Side Appeal filed under Order XXXIX Rule 9 of Original Side Rules r/w Clause 15 of the Letters against the Order and Decreeal Order 16.11.2018 passed in O.A. No. 724 of 2016 in C.S. No. 594 of 2016.

For appellant :Mr. M.L. Ganesh

For Respondents :Mr. M.S. Krishnan, Senior Advocate
for M/s. E.G. Hem Naag Indiran

JUDGMENT

Judgment of the Court was delivered by R. Subbiah, J)

The first respondent herein, as Plaintiff, has filed the suit in C.S. No. 594 of 2016 before this Court for the relief of declaration. In the said suit, the appellant herein is arrayed as third defendant. The respondents 2 to 7 herein were arrayed as defendants 1, 2, 4, 5, 6 and 7 respectively. The prayer in the plaint reads as follows:-

"a) declare that the corporate guarantees dated 22.03.2014 and 11.11.2014 (2 Nos.) furnished by the plaintiff are null and void as the same are vitiated by fraud and misrepresentation and consequently pass an order of permanent injunction restraining the 1 to 3 defendants, either through themselves, their men, servants, agents, representatives or any one claiming through them from taking any actions under the aforesaid documents;

(b) declare that the recall notices dated 13.04.2016, 12.05.2016 (3 Nos.) and 31.05.2016 (2 Nos.) issued by the 3rd, 2nd and 1st Defendants as null and void and consequently restrain the 1st to 3rd defendants, either through themselves, their men, servants, agents, representatives or any one claiming through them from taking any actions pursuant to the said recall notices;

(c) award the costs of the present suit in favour of the plaintiff;

(d) and grant such other and further relief (s) in favour of the plaintiff and against the defendants as this Honourable Court may deem fit, just and proper in the circumstances of this case and thus render justice."

2. According to the plaintiff/first respondent herein, the defendants 5 to 7 are wholly owned subsidiaries of the fourth defendant. The fourth defendant is engaged in the business of

providing education service and promoted by one Mr.P. Kishore along with his relatives and associates. Mr. Kishore was the Managing Director of the fourth defendant firm until 13.02.2012 and he was succeeded by Mr. Nikhil Gandhi who functioned as Director of the fourth defendant firm until 31.12.2012, when he resigned. It is the grievance of the plaintiff that on being induced by Mr. Nikhil Gandhi, the plaintiff's group company were made to acquire 35% equity shareholding in the fourth defendant firm through a combination of preferential allotment and open offer process during January 2012. It is only subsequently that the plaintiff's company discovered that the representations made by Mr. Nikhil Gandhi were false and based on fabricated documents pertaining to the business assets, receivables and profits maintained by the fourth defendant firm. The plaintiff firm also came to know that the fourth defendant firm had reflected in their books of accounts inflated statement with respect to assets and receivables and they are not genuine. According to the plaintiff firm, the erstwhile promoters of the fourth defendant firm have systematically misappropriated huge sums of amount in an illegal and unlawful manner in collusion with the defendants 1 to 3/respondents 2 and 3 and appellant herein. The shortcomings in the books and accounts of the firm were also admitted by the fourth defendant firm during an income tax dispute proceeding, which could be evident from the order dated 29.12.2011 of the Deputy Commissioner of Income Tax. The plaintiff also, in the plaint, placed reliance on the various Audit reports to contend that the fourth defendant firm, in collusion with defendants 1 to 3/appellant and respondents 2 and 3 banks herein, indulged in misappropriation of large sums of money. As the plaintiff is one of the equity shareholder of the fourth defendant company, the lenders have requested the plaintiff's group company to come up with proposal to revive the fourth defendant firm and the plaintiff also agreed to support the lender by providing corporate guarantees on the assurance given by the appellant/bank to lend a sum of Rs.80 crores to revive the fourth defendant firm. According to the plaintiff, as on 19.12.2013 and 22.03.2014 when the Debt Restructuring Agreements were entered into, the account of the fourth defendant was classified as "Non-performing asset" by the appellant/third defendant. In spite of the same, the appellant/third defendant bank induced the fourth defendant to execute the Debt Restructuring Agreements and compelled the first respondent/plaintiff group company to provide guarantees and securities. After the plaintiff executed corporate guarantees and securities, the third defendant/appellant bank informed about the fact that the Reserve Bank of India had declared the fourth defendant account with the third defendant bank as Non Performing Asset with effect from 31.03.2013. According to the plaintiff, they have furnished the corporate guarantees and securities with a bona fide intention to revive

the fourth defendant firm and thereby repaying the loans advanced by the lenders from the profits generated by the school business. While the facts are so as stated above, on 07.03.2016, the lenders held a Joint Lenders Meeting with the representatives of the fourth defendant during which the fourth defendant submitted a detailed response to the lenders and revealed their business plan. In spite of the same, the corporate guarantees executed by the plaintiffs were not released and the plaintiffs were made responsible for the mismanagement and misappropriation of amount committed by the fourth defendant in collusion with the defendants 1 to 3/appellant and respondents 2 and 3 bank. It is in those circumstances, the plaintiff has filed the suit.

3. Pending suit, the first respondent herein/plaintiff has filed O.A. No. 724 of 2016 in C.S. No. 594 of 2016 praying to grant an ad-interim injunction restraining the defendants 1 to 3 from taking any action as per the Corporate guarantees dated 22.03.2014 and 11.11.2014 furnished by the applicant/plaintiff pending disposal of the suit.

4. The application was resisted by the appellant/third defendant by contending that the suit is hit by the provisions of Section 18 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 34 of SARFAESI Act, 2002. It was further contended that a secured creditor has the right to enforce its security interest without the intervention of the Court or Tribunal in terms of Section 13 of SARFAESI Act. It was also stated that the fourth defendant had availed huge credit facilities from various banking and financial institutions and they are liable to pay a sum of Rs.570.06 crores and Rs.120.94 crores to the appellant/ third defendant bank. While so, the applicant/plaintiff, having offered corporate guarantees knowing the financial position of the fourth defendant, cannot now turn around and seek to restrain the appellant/bank from invoking the corporate guarantee. According to the appellant, the applicant/plaintiff has not made out any prima facie case for grant of interim injunction and therefore prayed for dismissal of the application.

5. When O.A. No. 724 of 2016 in C.S. No. 594 of 2016 was taken up for hearing, this Court, by order dated 20.04.2018, taking note of the fact that the date of communication with regard to declaring the status of the account of the fourth defendant as Non Performing Asset is absolutely material for deciding the entire dispute between the parties, directed the third defendant bank to furnish the entire correspondence from the Reserve Bank of India in respect of the subject matter of the lis and the details of communication received from the

Reserve Bank of India classifying the account of the fourth defendant as NPA before this Court on or before 05.06.2018.

6. Subsequently, when O.A. No. 724 of 2016 in C.S. No. 594 of 2016 was taken up for hearing on 25.06.2018, this Court once again directed the appellant/third defendant-bank to furnish the documents, as directed in the earlier order dated 20.04.2018 and adjourned the hearing of the application to 06.07.2017.

7. Thereafter, when O.A. No. 724 of 2016 in C.S. No. 594 of 2016 was taken up for hearing on 16.11.2018, this Court, finding that the appellant/third defendant bank did not furnish the documents as directed earlier, made absolute the direction issued on 20.04.2018. In the order dated 16.11.2018, it was specifically recorded by this Court that the third defendant/appellant bank has not complied with the orders of this Court dated 20.04.2018 and 25.06.2018, hence, the interim injunction already granted by this Court is made absolute. This order dated 16.11.2018 is challenged in this appeal by the third defendant/appellant bank.

8. Assailing the order dated 16.11.2018 passed by the learned single Judge, making the interim injunction absolute, the learned counsel for the appellant would contend that there cannot be an order of injunction restraining the appellant/third defendant bank from invoking the corporate guarantees given by the plaintiff. It is further stated that Section 34 of the SARFAESI Act specifically states that the Civil Courts have no jurisdiction to entertain any suit or proceeding in respect of any matter in which the Debts Recovery Tribunal or the Appellate Tribunal is empowered under this Act to determine and no injunction shall be granted by any Court or other authority. Even otherwise, the appellant had categorically stated in the affidavit filed on 04.08.2018 before the learned single Judge that except the report of Annual Financial Inspection done by auditors of the Reserve Bank of India, no other document is available in their possession, while so, directing the appellant to produce the communication relating to declaration of the account of the fourth defendant firm by the Reserve Bank of India is unjustified. The learned counsel further submitted that the appellant bank has already filed O.A. No. 83 of 2017 before the Debts Recovery Tribunal, Chennai for recovery of outstanding loan amount of Rs.158,79,24,752.75 in which the respondents 1, 4 to 7 have also entered appearance. In any event, the plaintiff had executed the corporate guarantees knowing fully well about the consequences thereof, while so, the suit as well as the application filed for interim injunction are not maintainable. In this regard, the learned counsel appearing for the appellant bank also relied on number of judgments to

submit that the suit is not maintainable and prayed for setting aside the order of the learned single Judge.

9. Per contra, Mr. M.S. Krishnan, learned Senior counsel for the plaintiff/first respondent submitted that the order dated 16.11.2018 was passed by the learned single Judge inasmuch as the appellant failed to comply with the earlier direction to furnish certain documents with respect to the classification of the account of the fourth defendant firm as 'Non performing asset'. This is more so that the plaintiff/first respondent has specifically contended that they were not aware of the classification of the account of the fourth defendant firm as "non performing asset" and by suppressing the same, the first respondent/plaintiff was made to execute the corporate guarantees with respect to the liability of the fourth defendant firm, by the appellant bank. It is further stated that the appellant, for the first time, in the Original Application filed before the Debts Recovery Tribunal disclosed the classification of the loan account of the fourth defendant as 'Non performing asset' and it was made known to the first respondent/plaintiff only during June 2015. In any event, the learned single Judge, in order to ascertain as to whether the first respondent/plaintiff was made aware of the classification of loan account of the fourth defendant prior to execution of the corporate guarantee, has directed the appellant bank to furnish certain documents. As the direction issued by the learned single Judge has not been complied with by the appellant, the order dated 16.11.2018 came to be passed by making the interim order absolute. The contention that Section 34 of SARFAESI Act operates as a bar for the Civil Court to grant interim injunction is not sustainable especially when the first respondent/ plaintiff has alleged fraud and collusion in obtaining corporate guarantees from them. Therefore, the learned single Judge has rightly entertained the suit and granted interim injunction and it does not call for any interference by this Court. However, the learned Senior counsel for the first respondent/plaintiff would submit that the appellant bank has already filed an Application No. 5867 of 2018 in C.S. No. 594 of 2016 under Order VII Rule 11 of CPC to reject the plaint as not maintainable and on the very same ground has filed this appeal. Therefore, if any decision is rendered in this appeal, it will have a bearing on the Application No. 5867 of 2018. Therefore, the learned Senior counsel prayed this Court to set aside the order of the learned single Judge, modify the order passed by the learned single Judge making the interim order absolute and remit the matter back to the learned single Judge with a direction to decide the Application No. 5867 of 2018 filed by the appellant bank.

10. We have heard the learned counsel on either side and perused the materials placed on record. Admittedly, the first respondent/plaintiff firm has executed corporate guarantees on 22.03.2014 and 11.11.2014, guaranteeing the liability of the fourth defendant firm towards its lenders. However, the plaintiff filed the suit by specifically contending that they were not aware of the fact that the loan account of the fourth defendant firm was classified into a 'non-performing asset' by the Reserve Bank of India on 31.03.2013 and had it been made known to them, they would not have executed the corporate guarantees. In other words, it is the contention of the first respondent/plaintiff that the appellant bank, by suppressing the fact with respect to classification of the loan account of the fourth defendant firm as 'non-performing asset' on 31.03.2013, made the first respondent/plaintiff to execute the corporate guarantees and therefore, to declare that such corporate guarantees executed by the first respondent/plaintiff in favour of the appellant bank will not bind the plaintiff, the suit was filed by the plaintiff/first respondent for the reliefs as stated above.

11. Pending suit, when the first respondent/plaintiff sought for interim injunction, the learned single Judge, having regard to the averment that the first respondent/plaintiff was not aware of the classification of the loan account of the fourth defendant firm before executing the corporate guarantees, directed the appellant bank to produce certain documents. It is contended by the appellant that whatever document that were available with them have been filed before the learned single Judge and in spite of the same, the learned single Judge directed the appellant to produce certain documents, which were not in possession of the appellant.

12. Be that as it may, it is now brought to the notice of this Court that even before the learned single Judge could pass the order dated 16.11.2018, which is impugned in this appeal, the appellant bank has filed Application No. 5867 of 2018 in C.S. No. 594 of 2016 on 10.07.2018. The application under Order VII Rule 11 of Code of Civil Procedure was filed with a prayer to reject the plaint as not maintainable on the ground of jurisdiction as well as for want of cause of action in lieu of statutory bar under Section 18 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 and Section 34 of SARFAESI Act, 2002 and consequently allow the above application with exemplary costs for filing the above vexatious suit by the first respondent/plaintiff. It is further stated by the learned counsel for the appellant that in view of the order dated

16.11.2018 passed by the learned single Judge, the Original Application filed by the appellant bank before the Debts Recovery Tribunal also could not be taken up for hearing and therefore, prayed for modification of the order.

13. Having regard to the fact that the appellant bank has already filed Application No. 5867 of 2018 in C.S. No. 594 of 2016 on 10.07.2018 for rejecting the plaint, as contemplated under Order VII Rule 11 of CPC, we are of the view that any decision rendered in this appeal will have a bearing while deciding the aforesaid Application No. 5867 of 2018 in C.S. No. 594 of 2016. Therefore, in the interest of justice, it is just and necessary to set aside the order of the learned single Judge making the interim order absolute, instead, there will be an interim injunction until further orders.

14. At this stage, the learned counsel for the appellant would contend that the interim order granted by the learned single Judge has resulted in the appellant bank unable to execute the corporate guarantees given in their favour by the first respondent/plaintiff and others and therefore, it may be clarified that the interim order granted by the learned single Judge would only cover the corporate guarantees given by the first respondent/plaintiff. It is needless to mention that the suit was filed only by the first respondent/plaintiff seeking to declare that the corporate guarantees furnished by them on 22.03.2014 and 11.11.2014 is void and un-enforcable. Therefore, the order passed by the learned single Judge would only have a bearing in so far as the corporate guarantees given by the first respondent/ plaintiff herein and not other guarantors in respect of the transaction in question. In fact, such a clarification has already been made by this Court in the order dated 07.08.2018 passed in Application Nos. 5866, 5867, 5158 and 5159 of 2016 in O.A. No. 724 of 2016 in C.S. No. 594 of 2016. Thus, the order dated 07.08.2018 itself would adequately protect the interest of the appellant bank and no further clarification is necessary.

15. In the light of the above, we dispose of the appeal by modifying the order dated 16.11.2018 passed in O.A. No. 724 of 2016 in C.S. No. 594 of 2016 to the effect that there shall be an interim injunction until further orders. The respondents in Application No. 5876 of 2018 are directed to file their counter affidavit within a period of two weeks shall file their counter affidavit so as to enable the learned single Judge to take up the Application No. 5867 of 2018 in C.S. No. 594 of 2016 filed by the appellant under Order VII Rule 11 of CPC for disposal on

merits. The learned single Judge is requested to take up Application No. 5867 of 2018 in C.S. No. 594 of 2016 filed by the appellant bank for rejection of the plaint and dispose of the same on merits and in accordance with law, within a period of six weeks. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras-104.

+1cc to M/s.M.L.Ganesh, Advocate Sr.99009
+1cc to M/s.Hen Naag Indiran, Advocate Sr.99494

OSA No. 100 of 2019

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