

In the High Court of Punjab and Haryana at Chandigarh

RSA- 4832 of 2019 (O&M)

Date of Decision:6.11.2019

Nanak Chand Bansal

---Appellant

vs.

Bank of Baroda and another

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Puneet Jindal, Senior Advocate with
Mr. Adarsh Jain, Advocate
for the appellant

Rekha Mittal, J.

Challenge in the present appeal has been directed against orders passed by the courts whereby application filed by respondent No. 1 namely Bank of Baroda (hereinafter referred to as “the bank”) for rejection of plaint under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure (in short “the Code”) was allowed by the trial court vide order dated 22.4.2019 that came to be affirmed in appeal by the Additional District Judge, Faridabad.

A brief backdrop of the case is that the appellant-plaintiff filed suit for declaration and permanent injunction that surety given by the appellant stood discharged and the bank should be restrained from taking over possession of the suit property allegedly mortgaged by him for securing repayment of loan taken by M/s SRS Real Infrastructure Limited when cash credit to respondent No. 2 was extended from Rs. 50 lakh to 65

lakh vide sanction letter dated 10.12.2015. The bank filed application for rejection of plaint with the averments that appellant stood guarantor for repayment of amount and executed equitable mortgage on 23.12.2015. The cash credit extended to respondent No. 2 became non-performing account. The bank being a secured creditor initiated proceedings against secured asset under The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short “SARFAESI Act”).

The appellant filed reply to the application claiming that suit property is still with the appellant and only symbolic possession was taken over. The case of the appellant is covered under Section 126 of the Indian Contract Act, 1872 (in short “the Act”) as the appellant has executed only personal guarantee for repayment of loan, therefore, relief claimed in the suit is not covered under Sections 17 and 34 of the SARFAESI Act. He denied the allegations that jurisdiction of civil court is barred and suit is not maintainable.

Counsel for the appellant would argue with vehemence that the borrower, M/s SRS Finance Limited executed instrument of hypothecation of book debts dated 23.12.2015 when cash credit limit was extended from Rs. 50 lakh to 65 lakh. The said agreement Annexure A-1 contained various terms and conditions agreed upon between the borrower and the bank particularly conditions contained in para 2, 4 to 9, 10(a) & 10(b) and 12 but since the bank did not bother to ensure compliance of those terms and conditions in the agreement aforesaid, the personal guarantee given by the appellant stood discharged, in view of the provisions of chapter VIII of the Act. It is further argued that in the given circumstances, provisions of

Section 31 of the SARFAESI Act are attracted, therefore, the courts have committed a gross error rather illegality by upholding plea of the bank that jurisdiction of the civil court is barred by invoking Sections 17 and 34 of the SARFAESI Act. In support of his contention, he has relied upon judgment of this Court **Deutsche Bank AG vs. M/s Nahar Industrial Enterprises Limited 2010 (14) RCR (Civil) 927**. Further reference has been made to judgment of the Rajasthan High Court **ICICI Bank Limited through its authorized Signatory Mohit Diwan, having its Branch office at' New Mandi, Bharatpur vs. Pramod Kumar Garg, S/o Tikaram, R/o Plot No. 2, Gita Colony Bharatpur and another 2018 (1) D.R.T.C. 826**.

I have heard counsel for the appellant and perused the paper book particularly various annexures appended with the grounds of appeal.

The appellant not only furnished the personal guarantee for repayment of outstanding liability by M/s SRS Real Infrastructure Limited, a concern constituted by the persons related to the appellant but also furnished guarantee by deposit of title deeds of the property in dispute.

The term 'guarantor' has not been defined under the SARFAESI Act. As per Section 2(2) of SARFAESI Act, the expression not defined in SARFAESI Act but defined in the Act or Transfer of Property Act, 1882 or Company Act, 1956 or the Securities and Exchange Board of India Act, 1992 shall have the same meaning assigned to them in those Acts. As per Sub Section 2(f) of SARFAESI Act, a guarantor or mortgagor is included in the definition of borrower. A relevant extract therefrom reads as follows:-

2(f) “borrower” means any person who has been granted

financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;”

The First Appellate Court has rightly held that plea of the appellant that his case falls under Sections 126 to 143 of the Act and not under the SARFAESI Act is devoid of merit.

Indisputably, the personal guarantee agreement was executed by the appellant at an early occasion viz-a-viz equitable mortgage created on 23.12.2015. Counsel, in response to a query, would fairly inform that in the document whereby equitable mortgage was created, there is no reference to the personal guarantee agreement nor the same was executed in continuation of the personal guarantee. As the appellant furnished security of the property in dispute by way of deposit of title deeds, it is difficult to accept contention of the appellant that his liability to repay the outstanding liability of respondent No. 2 stands discharged, as has been claimed.

To be fair to the appellant, counsel also raised a submission that in the guarantee agreement Annexure A-2, the bank got incorporated that the guarantor shall not be entitle to any of the rights conferred on surety by Sections 133 to 135, 139 and 141 of the Act but the said clause cannot be enforced by the bank as there cannot be estoppel against law or legal

right of a party. Firstly, the appellant till date has not challenged legality and validity of guarantee agreement dated 23.12.2015 (Annexure A-2). Once the appellant has not assailed validity of guarantee agreement on any score whatever, it is not open for him to argue that one of the terms and conditions contained in the said agreement is not binding upon him. Secondly, under Section 28 of the Act, agreements in restraint of legal proceedings are void except when the case is covered under the exceptions provided therein. Exception 3 deals with saving of a guarantee agreement of a bank or a financial institution. A relevant extract therefrom reads as follows:-

“This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.”

Counsel has not made any submissions as to why case of the appellant is not hit by Exception 3, noticed hereinbefore. In view of the above, appellant can not derive any advantage to his contentions from the cited judgments, rendered in view of peculiar facts and circumstances involved therein. As such, I do not find an error much less perversity in the

impugned orders that would call for intervention.

In view of what has been discussion hereinbefore, finding no
merit, the appeal fails and is accordingly dismissed in limine.

(Rekha Mittal)
Judge

6.11.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No