

Dewal Singhal Vs. State of Maharashtra

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Court : Mumbai

Decided On : Oct-17-2000

Reported in : [2001]106CompCas587(Bom)

Judge : B.N. Srikrishna and; Ranjana Desai, JJ.

Acts : Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 15, 22 and 22(4); Maharashtra Co-operative Societies Act, 1960 - Sections 101; Maharashtra Land Revenue Act, 1966; [Presidency Towns Insolvency Act, 1909](#)

Appeal No. : Appeal No. 821 of 2000, Appeal (Lodg.) No. 899 of 2000, Notice of Motion Nos. 96, 2820 and 2827 of 2

Appellant : Dewal Singhal

Respondent : State of Maharashtra

Advocate for Def. : D.D. Madan, Adv.

Advocate for Pet/Ap. : V.J. Makhija and; Kamal Parsurampurua, Adv.

Disposition : Appeals dismissed

Judgement :

1. Appeals admitted. Notice made returnable forthwith. Respondents in both the appeals waive service through their counsel.

2. Notice of Motion No. 96 of 2000 taken out for condonation of delay in presentation of Appeal Lodging No. 899 of 2000. By consent allowed and made absolute. Delay condoned. Appeal to be numbered.

3. These two appeals raise common issues of fact and law and, therefore can conveniently be disposed of by a common judgment.

4. The respondent in both these appeals is a co-operative bank. The respondent had advanced certain monies to two companies known as Shubham Vanijya Ltd. and Singhal Swaroop Ispat Ltd. The appellant herein was a guarantor of the loans advanced by the respondent to the said companies. The respondent moved the Assistant Registrar of Co-operative Societies under Section 101 of the Maharashtra Co-operative Societies Act, 1960, for issuance of a recovery certificate. On 5-8-1909, a recovery certificate was issued by the Assistant Registrar of Co-operative Societies in which he held that Subham Vanijya Ltd. and Singhal Swaroop Ispat Ltd. and the present 'appellant (who are respectively respondent Nos. 1 to 3 in the proceedings before him) shall pay to the respondent-bank 'severally arid jointly' an amount of Rs. 57,46,427 and Rs. 555 towards the fee and cost of the application, in all amounting to Rs. 57,46,982 together with interest at 20.5 per cent per year (17.5 per cent + penalty interest at 3 per cent) or at the rate of interest fixed by the Reserve Bank from time to time on the principal amount from 1-1-1997, till the entire amount is realised. He made a further order therein, that the aforementioned amount shall be deemed to be arrears of land revenue within the meaning of the Maharashtra Land Revenue Act, 1966, and shall be recoverable from the debtors by following the procedure for recovering land revenue, but that the amount shall first be recovered from the borrower and, in case it was not possible to recover from the borrower, the same shall be recovered from the sureties.

5. The principal-debtor Singhal Swaroop Ispat Ltd; filed an application under Section, 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) sometime in December, 1997, for being declared as a sick unit. The Board for Industrial and Financial Reconstruction (BIFR) declared the said company as sick undertaking on March, 2000. Consequently, the provisions of Section 22 of

the SICA came into force and the respondent was unable to recover the debt from the principal debtor-company. Since the order of the recovery certificate was issued against all the respondents to the proceedings before the Assistant Registrar, jointly and severally, the respondent took out an insolvency notice bearing No. N/44 of 1998 dated 25-6-1998. This notice called upon the appellant to pay the amount certified by the Assistant Registrar or provide security therefor or to put forth any set off or counter claim, if any.

6. The appellant took out Notice of Motion No. 71 of 1998 setting aside the insolvency notice. This notice of motion was heard and dismissed by an order made on 20-12-1999, by a learned Single Judge (Rebello J.). Since the notice of motion was dismissed, the respondent took out Insolvency Petition No. 12 of 2000, for having the appellant adjudicated as an insolvent under the provisions of the [Presidency Towns Insolvency Act, 1909](#).

7. At this stage, for some inexplicable reason, the appellant did not contest the insolvency petition and the insolvency petition came to be made absolute by the order of Paikar J. dated 18-7-2000.

8. After the official assignee issued notice to the appellant, the appellant took out 'Notice of Motion No. 96 of 2000, for setting aside the order of adjudication made in Insolvency Petition No. 12 of 2000 This Notice of Motion No: 96 of 2000 was also heard and dismissed on the merits by the order of Paikar J, dated 8-9-2000. The appellant has preferred two appeals. Appeal No. 821 of 2000 is directed against the order of Paikar J. dated 8-9-2000 while, Appeal Lodging No. 899 of 2000 is directed against the order of Palmar J. dated 18-7-2000, making the insolvency petition absolute and adjudicating the appellant 33, an insolvent.

9. It is not disputed before us that the insolvency petition was made absolute because there was no opposition to it on that day when it was taken up for hearing. The learned Single Judge (Paikar J.) was satisfied that the notices had been duly served and since there was, no opposition, he was pleased to make the petition absolute. It is only in the notice of motion taken out for setting aside the order of adjudication, i.e., Notice of Motion No. 821 of 2000, that the appellant insolvent raised certain contentions. Even in this notice of motion it is not the case

of the appellant that he had not been served with the insolvency petition or that he had no notice of the date of hearing of the insolvency petition. The contentions urged in Notice of Motion No. 96 of 2000 are as under :

10. The appellant is the guarantor of certain loans to Singhal Swaroop Ispat Ltd. in respect of which, proceedings are pending before the BIFR under the provisions of the SICA. In view thereof, the recovery certificate itself could not be enforced against the appellant in his capacity as guarantor of certain loans to the said industrial, company'in respect of which, proceedings are pending before the BIFR under the SICA.

11. Reliance is placed on the provisions of Section 22 as interpreted by the Supreme Court in the judgment of Patheja Bros. Forgings & Stamping v. ICICI Ltd. [2000] 102 Comp. Cas. 21. The Supreme Court after analysing the provisions of Section 22, held in Patheja Bros. Forgings & Stamping's case (supra) that in the case of an industrial company in respect of which proceedings are pending in the BIFR no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company, or for the appointment of a receiver, could be instituted or proceeded with! A suit or any proceedings for the enforcement of security could not be maintained against such industrial company and a suit for enforcement of a guarantee in respect of any loan or advance granted to the industrial company was barred. A reading of the judgment of the Supreme Court makes out this distinction and the learned Judge was, therefore, right in his view that, as far as the proceedings against the guarantor of the loan to the industrial company are concerned, the bar under Section 22 is restricted only to a 'suit' and does not apply to any other proceedings. The learned Single Judge also relied on the judgment of this Court in Sharad R. Khanna v. Karimjee Ltd. [1995] 84 Comp. Cas. 611. The Division Bench of this Court, in this case, was squarely concerned with a situation of an insolvency notice issued to such a guarantor company. The Division Bench opined that it was difficult to consider the issuance of an insolvency notice as 'proceeding further' with the original suit. It was held that an insolvency notice is an independent proceeding with its own consequences, although it may be considered as a mode of equitable, execution.

12. As far as the appellant's case is concerned, in our judgment, the view taken by the Division Bench of this Court in Sharad R. Khanna's case(supra) was binding on the learned Single Judge. It is indeed binding on us too. Upon a conjoint reading of Patheja Bros. Forgings & Stamping's case(supra) and Sharad R. Khanna's case (supra), we are of the view that the only proceeding against the guarantor of a loan to an industrial company which is barred under Section 22 is a 'suit' and nothing else. An insolvency notice is not a suit and therefore, the said proceeding was not barred. The learned Single Judge was justified in holding that the appellant's case was not covered by the provisions of Section 22 and, that there was no reason to entertain the notice of motion. The learned Judge was, therefore, justified in dismissing Notice of Motion No. 96 of 2000. We are fully in agreement with the view of the learned Single Judge. We too find no substance in the appeal. Appeal No. 821 of 2000, therefore, is liable to be dismissed.

13. We then turn to Appeal Lodging No. 899 of 2000, which is, filed against an order of, adjudication. In this appeal, the only contentions urged are with regard to the validity of the recovery certificate and the same contention based on Section 22. Since we have already rejected the contention with regard to the provisions of Section 22, we do, not propose to deal with it once again.

14. Mr. Makhija, the learned counsel appearing for the appellant, contended that the recovery certificate issued by the Assistant Registrar on 5-8-1997, was conditional upon the recovery of the amount from the principal debtor becoming impossible; since this had not happened, he contended that the recovery certificate could not have been enforced against the appellant at all. In our View, this contention is to be rejected for more than one reason. In the first place, we do not read the recovery certificate dated 5-8-1997 as a conditional recovery certificate. The Assistant Registrar in terms holds, that the liability of the two companies and the present appellant was joint and several. Merely because he gave a facility that the recovery certificate, be enforced against the principal debtor before being enforced against the appellant-guarantor, we do not think that the validity of the recovery certificate became contingent upon the amount becoming impossible of recovery from the principal debtor-company, Secondly, we find that no such issue was urged before the learned Single Judge since the petition was

not contested at all. Finally, even in the memo of appeal, there is no such contention raised. Mr. Makhija drew our attention to grounds (b) and (c) of the appeal memo and attempted to persuade us that grounds (b) and (c) contain this contention in an incipient form. Grounds (b) and (c) of the appeal memo read as under:

'(b) Under recovery certificate dated 5-8-1997, issued by the Assistant Registrar of Co-operative Societies the decretal amount was directed firstly to be recovered from the borrower and if the said amount is not recoverable from the borrower due to legal procedure, the said amount was then directed to be recovered from the sureties. Inasmuch as the borrower is declared a sick undertaking and direction given under Section 22 of the said Act under order dated March 23, 2000 by the Board for Industrial and Financial Reconstruction, the learned Judge ought not to have passed, the impugned order as decree/recovery certificate dated 5-8-1997, being against the company in BIFR and surety (guarantee) the judgment-debtor could not be enforced in view of Section 22(4) of the said Act and settled law.

(c) The learned Judge fail to appreciate that the appellant was a guarantor and even if the certificate was issued on 5-8-1997 prior to the company (the principal debtor) having made application in the BIFR in December, 1997, the decree/certificate of recovery amount could be enforced as Singhal Swaroop Ispat Ltd., the principal borrower was declared a sick undertaking.'

15. A careful perusal of ground (b) would suggest that since the principal debtor had been declared a sick undertaking by the BIFR by order dated 23-3-2000, the learned Single Judge ought not to have confirmed order dated 5-8-1997, as the impugned order against the judgment debtor could not be enforced in view of Section 22(4). There is not even a whisper there that the decretal amount was not recoverable from the appellant-guarantor, because the condition precedent in the recovery certificate had not been fulfilled (in fact, the suggestion seems to be the converse). Turning to ground (c), it is in terms admitted by the appellant that the certificate of recovery could not be enforced against Singhal Swaroop Ispat Ltd. (principal debtor) as it was declared a sick undertaking, though a corollary is drawn from it, that the insolvency petition based on the said certificate against the

appellant-guarantor was not tenable. We are unable to read in either ground the contention that Mr. Makhija so strenuously urged before us. The insolvency petition was not contested. Nor is there any case made out before us for interference with the impugned order of the learned Single Judge (Rebello, J.). We are, therefore, of the view that this appeal too has no substance and needs to be dismissed.

16. Hence the following order :

(i) Appeal No. 821 of 2000 is dismissed.

(ii) Appeal Lodging No. 899 of 2000 is dismissed.

(III) The appeals having been dismissed, nothing survives in Notices of Motion Nos. 2820 and 2827, which are hereby dismissed.

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