

Union Bank of India Vs. Garden Ceramics Pvt. Ltd. and ors.

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Court : DRAT Delhi

Decided On : Jan-14-2004

Reported in : I(2005)BC164

Judge : K Kumaran

Appellant : Union Bank of India

Respondent : Garden Ceramics Pvt. Ltd. and ors.

Judgement :

1. Appellant-Union Bank of India (hereinafter referred to as 'the appellant-Bank') filed O.A. 371/98 against 6 defendants who are respondent Nos. 1 to 6 herein (hereinafter referred to as 'the defendant Nos. 1 to 6') for the recovery of Rs. 88,56,535.16 with interest thereon @ 17.34% per annum with quarterly rest's from the date of O.A. till the recovery of the amount. The learned Presiding Officer of the Debts Recovery Tribunal, Jaipur (hereinafter referred to as 'the DRT') by his final order dated 26th July, 2001 ordered that the appellant-Bank is entitled to recover this amount from defendant Nos.

1,4, 5 and 6 with interest @ 6% per annum from the date of filing the O.A. He held that defendant Nos. 2 and 3 are not responsible for this amount. Aggrieved, the appellant-Bank has approached this Tribunal with this appeal with a prayer for directing all the defendant Nos. 1 to 6 to pay the amount with interest @ 17.34% per annum with quarterly rests from the date of O.A. till realisation. The defendant Nos. 1 to 6 did not file any reply to this appeal. The learned Counsel for the

defendant Nos. 2 and 3 stated that he will address arguments opposing the appeal.

2. I have heard the Counsel for both the sides, and perused the records.

3. The case of the appellant-Bank, as set out in the O.A., in brief is as follows: Initially defendant Nos. 2 and 3 were the Directors of the 1st defendant-Company, and the defendant Nos. 4 to 6 also became the Directors on 27th August, 1996.

1st defendant-Company approached the appellant-Bank for certain credit facilities. On 25th July, 1995, the loan documents were executed, and the defendant Nos. 2 and 3 gave personal guarantees for the repayment of the credit facilities advanced to the 1st defendant by executing letters of guarantee. The 1st defendant-Company also created a mortgage by depositing the title deeds in respect of the property mentioned in the O.A. Subsequently, on 27th August, 1996, the defendant Nos. 4 to 6 became Directors of the 1st defendant-Company and for the due payment of the amount, apart from executing the loan documents, they also gave their personal guarantee by executing the letter of guarantee in favour of the appellant-Bank. The 1st defendant-Company also agreed to pay minimum interest of 17.5% with quarterly rests. The 1st defendant-Company, which had availed the credit facilities, did not repay the amount in time.

4. That is why O.A. 371/98 was filed before the DRT. The defendants 2 and 3 filed written statement to the O.A. urging as follows: By resolution dated 27th August, 1996, the defendant Nos. 4 to 6 were appointed as Directors. There was a pre-condition that the defendant Nos. 4 to 6 would operate the Bank account, and no other Director would do so. Defendant Nos. 2 and 3 had no objection to the same. For this purpose, resolution-Exhibit 25 dated 27th August, 1996 was passed. The total project was placed before the appellant-Bank by defendant Nos. 4 to 6, and it was informed that the defendant Nos. 4 to 6 will soon become the owner of the Company.

The defendant Nos. 4 to 6 also took the responsibility to repay the loan to the Bank, and instead of the personal guarantee and documents executed by the defendant Nos. 2 and 3, defendant Nos. 4 to 6 agreed to execute fresh

documents. The appellant-Bank also agreed to the same, and informed defendant Nos. 4 to 6 to execute the documents and personal guarantees afresh. As per this proposal, defendant Nos. 2 and 3 would be released from their personal liability. The defendants 4 to 6 executed the documents Exhibits A-26 to A-36. The appellant-Bank informed the defendant Nos. 2 and 3 that the documents Exhibit A-5 to Exhibit A-23, which defendant Nos.

2 and 3 had earlier executed, have become null and void, and thus, they are free from liability. The documents executed by defendant Nos. 2 and 3, namely, Exhibits A-5 to A-23 were cancelled.

Therefore, the appellant-Bank has no claim against defendant Nos. 2 and 3, and the appellant-Bank is estopped from claiming any amount from the defendant Nos. 2 and 3. The interest claimed is excessive and unlawful. The respondent-Bank has executed documents exonerating the personal liability of defendant Nos. 2 and 3, and fixing the liability with defendant Nos. 4 to 6.

5. Defendant Nos. 4 to 6 also filed a reply, among other things disputing their liability, urging that on or after 30th August, 1996, no loan was disbursed, and that the alleged documents executed by them, including the personal guarantee, are null and void. They have also urged that property has been mortgaged by the defendant-company, and security has been provided by defendant Nos. 1 to 3, which were more than the loan amount. These defendants have also urged that the interest claimed is excessive, and that interest and penal interest have been claimed contrary to the provisions of law.

6. As pointed out already, the learned Presiding Officer passed the final order against defendant Nos. 1 and 4 to 6 only. No liability was fastened on defendant Nos. 2 and 3, accepting the contention of defendant Nos. 2 and 3. The learned Presiding Officer referred to the resolution passed by the 1st defendant-Company namely, Exhibit 25, whereby only defendant Nos. 4 to 6 were authorised to operate the Bank account, and it was resolved that the Bank should be informed that the cheques, promissory notes and other orders drawn by defendant Nos. 2 and 3, the Directors of the Company, should not be honoured from that date. The learned Presiding Officer also observed that the defendant Nos. 4 to 6 executed

the documents afresh and, therefore, defendant Nos. 2 and 3 are not responsible for the loans advanced to the 1st defendant-Company. He also held that on execution of the fresh documents on 30th August, 1996 there was novation of the contract, and the liability of the defendant Nos. 2 and 3 came to an end. He also observed that it has not been pleaded by the respondent-Bank that the guarantee given by defendant Nos. 4 to 6 is an additional guarantee.

7. Therefore, the question that arises for consideration in this appeal is whether by the reason of the fact that defendant Nos. 4 to 6 executed fresh documents, and letter of guarantee on 30th August, 1991 there has been a novation of the contract between the appellant-Company and defendant Nos. 1 and 4 to 6 and, therefore, defendant Nos. 2 and 3 are discharged from their liability to act as per the guarantee deeds executed by them. Another question that arises for consideration is whether appellant-Bank agreed that defendant Nos. 2 and 3 are discharged from their liability to pay the amount as per the guarantee deeds executed by them. The further question is whether such pleas are open to them in law. Yet another question that arises for consideration is whether the appellant is entitled to interest as claimed by it? 8. I will first take up the question of interest. The appellant-Bank claimed in the O.A. interest @ 17.34% per annum with quarterly rests from date of O.A. to date of recovery of the amount due. The learned Presiding Officer of the DRT has, in the impugned final order dated 26th July, 2001, granted simple interest @ 6% from date of O.A. till date of recovery.

9. The contention of the learned Counsel for the appellant-Bank is that the learned Presiding Officer of the DRT has not given any reasons for allowing simple interest, and that too, @ 6% per annum as against @ 17.34% per annum with quarterly rests claimed by the appellant-Bank except stating that since the property of the 1st defendant has been mortgaged with the appellant-Bank and considering the principle laid down by the Hon'ble Supreme Court in AIR 1998 Supreme Court 1101, N.M.Veerappa v. Canara Bank, he deems it fit to allow interest @ 6% from date of O.A. till realisation.

10. The learned Counsel for the appellant contends that this Tribunal in State Bank of India v. Jagdamba Medicos and Ors., I (2003) BC 53 (Appeal 173/2000)

decided on 28th March, 2002 has held that the DRT has the independent power to grant pendente lite and future interest under Sub-section (20) of Section 19 the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act'), and is not bound to follow the provisions of the Order XXXIV Rule 11 or Section 34 of the Code of Civil Procedure. He also points out that this Tribunal has also held that the Tribunals under the Act have discretion in the matter of grant of pendente lite and future interest, but did not agree with the contention that it cannot be more than 6% per annum in the cases where the Banks have the properties mortgaged with them. He also points out that it has been held that even under the Code of Civil Procedure there is no upper limit of 6% per annum for granting interest on the amount decreed as principal sum and interest thereon. He also points out the decision in N.M. Veerappa's case has also been distinguished by this Tribunal.

11. The learned Counsel for the appellant-Bank points out that this Tribunal, after elaborately considering all the points raised before it, held that the DRT was not under any compulsion to grant pendente lite and future interest at a rate not more than 6% per annum, and, therefore, remanded the matter back to the Tribunal for reconsideration of this aspect, namely, the rate of pendente lite and future interest that could be awarded by the Tribunal.

12. A perusal of the order of this Tribunal in Jadgamba Medicos and Ors.' case supports the contention of the appellant-Bank. The DRT is not bound to grant interest @ 6% per annum only for the period from date of O.A. till realisation of the amount. The Tribunal has the discretion to award interest at such rate as it deems fit for the said period, based upon the facts and circumstances of the case, but he has got only to give reasons for doing so.

13. Therefore, in my view, the matter has to be remanded back to the DRT concerned with regard to the rate of pendente lite and future interest that can be granted. The learned Presiding Officer, after giving opportunity of hearing to all the parties, has to decide the pendente lite and future interest payable by the defendants at such rate as he deems fit by giving proper reasons. As far as defendant Nos.

2 and 3 are concerned, this is, of course, subject to the decision on the question of liability of the defendant Nos. 2 and 3 to pay any amount, inasmuch as defendant Nos. 2 and 3 claim that they are not liable to pay any amount to the appellant-Bank.

14. The next question to be considered is with regard to the liability of defendant Nos. 2 and 3 to pay any amount. The learned Counsel for the appellant-Bank contends that the documents and the guarantee deeds were taken from defendant Nos. 4 to 6 by way of additional security/guarantee and, therefore, defendant Nos. 2 and 3 are not absolved from their liability to pay the amount as per the personal guarantee given by them under the guarantee deeds dated 25th July, 1995 executed by them. The copies of the guarantee deeds executed by defendant Nos. 2 and 3 respectively have been filed with the appeal.

The learned Counsel for the appellant-Bank points out that in each of these guarantee deeds, it has been specifically mentioned in Clause (2) that it is a continuing security until the receipt by Bank of a notice in writing about its discontinuance. He also points out Clauses (3) and (8) of the deed of guarantee. Clause (3) reads as follows: "This guarantee is additional and without prejudice to any securities or obligations which the Bank may now or hereafter have in respect of any indebtedness or liabilities hereby guaranteed and all rights and remedies in respect thereof are reserved." "I/we hereby consent to your making any variance that you may think fit in terms of your contract with the principals to your determining, enlarging or varying any credit to him/them to your making any composition with him/them or promising to give him/them time or not to sue him/them and to your parting with any security you may hold for the guarantee debt and accordingly I/we shall not be entitled to claim any of the rights conferred or studies (mistake for "sureties") by Sections 133,134,139 and 141 of the Contract Act." 15. He also contends that no new facilities were granted when defendant Nos. 4 to 6 executed the personal guarantee. The learned Counsel for the appellant-Bank also contends that there was no change in the terms and conditions of the contract, but the guarantee deed was taken from defendant Nos. 4 to 6 by way of additional guarantee. He also contends that the defendant Nos. 4 to 6 also have executed the guarantee deeds with similar details. He, therefore,

contends that defendant Nos. 2 and 3 cannot claim to have been discharged from their liability.

16. But, the learned Counsel for the defendant Nos. 2 and 3 contends that apart from the deeds of guarantee, the defendant Nos. 4 to 6 also executed the other loan documents afresh. He also points out that by the resolution-Exhibit 25 passed by the 1st defendant-Company, only defendant Nos. 4 to 6 were authorised to operate the Bank account, and that it was resolved that the Bank should be informed not to honour any cheque or other order issued or any promote executed by defendant Nos.

2 and 3. He contends that this will show that the defendant Nos. 2 and 3 have been discharged from their liability as per the guarantee deeds.

17. In this connection, the learned Counsel for the defendant Nos. 2 and 3 contends that it was agreed that the defendant Nos. 2 and 3 should be released from the liability, and defendant Nos. 4 to 6 would become the Directors, which fact was also brought to the notice of the appellant-Bank. He contends that there was otherwise no need for getting fresh document or fresh security for the defendant Nos. 4 to 6.

The learned Counsel for the defendant Nos. 2 and 3 contends that the appellant-Bank and defendant Nos. 1 to 6 came to an understanding that defendant Nos. 2 and 3 should be released from their liability. He also contends that the guarantee deed executed by defendant Nos. 4 to 6 was not by way of additional security. The learned Counsel for the defendant Nos. 2 and 3 contends that in para 3 of the written statement filed to the O. A., it has been specifically mentioned that defendant Nos. 4 to 6 undertook the responsibility to repay the loan, and agreed that fresh guarantee deed will be executed by defendant Nos. 4 to 6 instead of personal guarantee and documents executed by defendant Nos.

2 and 3. He also points out that it has been specifically mentioned in this written statement that the appellant-Bank also agreed to the same, and told defendant Nos. 4 to 6 to execute the documents and personal guarantee, that the defendant Nos. 4 to 6 accordingly executed the documents and the guarantee, on which the

appellant-Bank informed the defendant Nos. 2 and 3 that the documents executed by the defendant Nos. 2 and 3, namely, Exhibits A-5 to A-23 became null and void, and were cancelled. Pointing out these averments, the learned Counsel for the defendant Nos. 2 and 3 contends that no rejoinder was filed by the appellant-Bank denying these averments. He also contends that the evidence on behalf of the defendant Nos. 2 and 3 was adduced by way of affidavit, and the appellant-Bank did not even cross-examine the witness. Therefore, the learned Counsel for the defendant Nos. 2 and 3 contends that there has been a novation of the contract, and the defendant Nos. 2 and 3 are not bound to perform the earlier contract in view of Section 62 of the Contract Act.

18. In this connection, the learned Counsel for the defendant Nos. 2 and 3 relies upon a decision of the Debts Recovery Appellate Tribunal, Mumbai (for short 'DRAT, Mumbai') in *Globcal Granimarmo Ltd. v. State Bank of Saurashtra*, 1 (2000) BC 57=2001 R.D.C. 247. But, that was a case in which the Bank had sanctioned cash credit limit to the first defendant, of which the 2nd defendant was the Managing Director while defendant Nos. 2 and 5 were Directors. The limit was subsequently enhanced and additional facilities of Foreign Letter of Credit were also sanctioned by the Bank. The 4th defendant had contended that he had already revoked his guarantee and the Bank had obtained fresh guarantee deed and, therefore, he was discharged. In these circumstances, the DRAT, Mumbai held that the 4th defendant had already informed the Bank that he was retiring, and in his place the defendant No. 5 was appointed as Director. It also noticed that the resolutions passed to that effect were forwarded to the Bank, on which the Bank had acted and obtained fresh documents including balance confirmation letter fastening the liability of the 5th defendant. The DRAT, Mumbai, therefore, upheld the finding that the 4th defendant was absolved by the Bank itself. In the case on our hand the defendant Nos. 2 and 3 had not revoked the guarantee nor had they retired from the directorship.

No fresh or enhanced facilities were given by the Bank when the defendant Nos. 4 to 6 executed the documents. Therefore, this decision will not be of any help to the defendant Nos. 2 and 3. *Lata Construction v. Rameshchandra Ramniklal Shah*, AIR 2000 SC 380, was a case where the respondents (before the Hon'ble

Supreme Court) urging that the appellants (before the Hon'ble Supreme Court) had entered into an agreement dated 27th January, 1987 to provide them a flat but had not done so, had approached the National Consumer Disputes Redressal Commission (for short 'National Commission'). The appellants (before the Hon'ble Supreme Court) had had entered into a fresh agreement with the respondents on 23rd February, 1991, and had agreed to pay the respondents a particular amount in three instalments.

20. The appellants had not honoured the commitments under both the agreements and the respondents approached the National Commission which decreed the claim of the respondents for Rs. 9,51,000/- with interest, against which appeal was filed before the Hon'ble Supreme Court.

21. The Hon'ble Supreme Court found that the agreement dated 23rd February, 1991 showed that the rights under agreement dated 27th January, 1987 would remain unaffected. It was contended that the agreement dated 27th January, 1987 had been substituted by a fresh agreement dated 23rd February, 1991 for enforcing which the Civil Court must be approached. This plea was rejected by the National Commission.

On Appeal, the Hon'ble Supreme Court held as follows: "One of the essential requirements of Novation', as contemplated by Section 62 is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract." 22. In the instant case, the rights under the original contract were not given up as it was specifically provided in the subsequent contract that the rights under the old contract shall stand extinguished only on payment of the entire amount of Rs. 9,51,000/-. Since the amount was not paid by the appellants as stipulated by the subsequent contract, the rights under the original contract were

still available to the respondent and he could legally claim enforcement of those rights.

Obviously, under the original contract, the appellants were under an obligation to provide a flat to the respondents. This right would come to an end only when the appellants had, in pursuance of the subsequent contract, paid the entire amount of Rs. 9,51,000/- to the respondents.

Since they had not done so, the respondents could legally invoke the provisions of the earlier contract and claim before the Commission that there was "deficiency in service" on the part of the appellants." 23. This decision also will not be of help to defendant Nos. 2 and 3 inasmuch as there is nothing to show that the appellant-Bank had entered into a completely new contract with defendant Nos. 1 and 4 to 6 in place of the original agreement with defendant Nos. 1 to 3. The defendant Nos. 4 to 6 had become Directors of the 1st defendant-Company by the resolution dated 27th August, 1996. They had also executed certain documents and guarantee deeds but no fresh facilities were granted. There is also no change in the terms and conditions except that the defendant Nos. 4 to 6 have also undertaken the liability. In these circumstances, it cannot be stated that there has been a substitution of the agreement between appellant-Bank on one hand and the defendant Nos. 1 to 3 on the other with a fresh or new agreement between appellant-Bank on one hand and defendant Nos. 1 and 4 to 6 on the other.

24. The decision in *Indian Bank, Madras v. S. Krishnaswamy*, AIR 1990 Madras 115, related to a case where the appellant-Bank had given certain facilities to Bharthy Mills Ltd. The plaintiffs in the suit stood sureties, and even had deposited the title deeds etc. In November 1965 the principal debtor-Bharthy Mills Ltd. was notified under the Industries (Development and Regulation) Act, 1951 by the Government of India and the Authorised Controller took charge of the Company on 5th May, 1966. The appellant-Bank had entered into a fresh agreement with the principal debtor on 7th January, 1967 and 23rd January, 1967 by which all outstanding accounts were adjusted and converted into a term loan for Rs. 35 lacs. By its negligence the Bank had lost goods worth Rs. 19 1/2 lacs, in their custody. It is in these circumstances, the Hon'ble Madras High Court held that the

sureties, who had even no knowledge of this fresh agreement, were discharged from their liabilities.

25. In the present case on hand, the defendant Nos. 2 and 3 still remain to be the directors, through, by the resolution dated 27th August, 1996 (Exhibit 25) it was resolved that the defendant Nos. 4 to 6 have been authorised to operate the Bank account, and that the Bank should be informed not to honour any cheque or other order drawn or promissory notes executed by the defendant Nos. 2 and 3, the other directors of the Company. It is not as if the defendant Nos. 2 and 3 ceased to be the Directors or that the 1st defendant-Company has been taken over by the defendants 4 to 6. Therefore, when the appellant-Bank had taken fresh documents and guarantee deeds from defendants 4 to 6 without any change in the terms and conditions or without there being any fresh facility extended to the 1st defendant-Company, it cannot be stated that there has been any complete novation or variation of the earlier contract with defendant Nos. 1 to 3. Therefore, on the execution of these documents by defendant Nos. 4 to 6, it cannot be stated that the defendant Nos. 2 and 3 stood automatically discharged.

If the defendant Nos. 1 to 6 among themselves had even come to an agreement to relieve defendant Nos. 2 and 3 of their liability, it does not mean that the Bank has also accepted the same. Taking certain documents and guarantee deeds executed from defendant Nos. 4 to 6 does not mean that there has been a change, variation or novation of the contract with defendant Nos. 1 to 3. This is especially so, when the guarantee deeds executed by defendant Nos. 4 to 6 say that they are additional guarantees.

26. But, the guarantee deeds executed by defendant Nos. 2 and 3 specifically state that they will continue to be in force till a notice in writing is given by the defendant Nos. 2 and 3 for its discontinuance. This apart, the defendant Nos. 2 and 3 have, in the reply filed to the O. A. (before the DRT), specifically alleged that the appellant-Bank has executed documents removing the personal liability of defendant Nos. 2 and 3, and fastening the liability on defendant Nos. 4,5 and 6. If the Bank had agreed to absolve the defendant Nos. 2 and 3 and had fastened the liability on defendant Nos.

4 to 6 by executing the documents, as alleged, I am of the view that the defendant Nos. 2 and 3 should be given an opportunity to place those documents and establish their case in this behalf. Therefore, in my view, the matter has to be remanded back to the DRT for further inquiry in this regard also and fresh disposal.

27. Of course, the learned Counsel for the appellant-Bank, on the other hand, contends that even according to the defendant Nos. 2 and 3 this subsequent agreement pleaded by the defendant Nos. 2 and 3 is only an oral agreement, which cannot be pleaded in view of the provisions of Sections 91 and 92 of the Indian Evidence Act. The learned Counsel for the appellant-Bank contends that there cannot be any oral evidence of an oral agreement to vary the terms of the written contract in view of these provisions of the Indian Evidence Act and, therefore, the pleadings found in the written statement of defendant Nos. 2 and 3 in this regard cannot be entertained at all; and therefore, the contention that no rejoinder was filed, or that there was no cross-examination on this point, cannot be urged in support of a plea, which itself is not admissible.

28. If there is no written agreement between Bank and the defendant Nos. 2 and 3 to absolve the defendant Nos. 2 and 3 from the liability as contended, then the further question will be whether the defendant Nos. 2 and 3 will be entitled, in law, to put forward the plea that there is such an oral agreement to that effect, and whether there is acceptable evidence for the same. It has also to be considered and decided by the DRT and also as to whether the fact that no rejoinder was filed and there was no cross-examination of the witness(es) examined on the side of the defendant Nos. 2 and 3 by the appellant-Bank can be put forward by the defendant Nos. 2 and 3, if they are not entitled to urge in law that there was such an oral agreement to absolve the defendant Nos. 2 and 3 from the liability, i.e. to plead an oral agreement as against a written agreement.

29. Therefore, taking into consideration all these aspects, I am of the view that the impugned order of the DRT dated 26th July, 2001, insofar as it has not granted the final order as against defendants 2 and 3; and has granted pendente lite and future interest only @ 6% per annum, has to be set aside, and the matter has to

be remanded back to the concerned DRT for further inquiry and fresh disposal with regard to these matters after giving all the parties opportunity to put forward their case, and even to lead further evidence.

30. Accordingly, the appeal is allowed setting aside the impugned final order dated 26th July, 2001 insofar as (1) it has not granted final order (Recovery Certificate) against the defendant Nos. 2 and 3, and (2) it has granted pendente lite and future interest only @6% per annum. The matter is remanded back to the DRT concerned with regard to these matters.

31. The learned Presiding Officer of the DRT will take the O.A. back to his file with regard to these matters, give opportunity to both the sides to put forward their case, including the opportunity to lead further evidence, and then dispose of the O.A. with regard to these matters in accordance with law and in the light of the observations contained in this order. For this purpose, the parties are directed to appear before the DRT concerned on 22nd March, 2004 for taking further directions in this matter without awaiting a notice from the DRT. Copy of this order be given to the parties and be forwarded to the concerned DRT.

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