

N.B. Gurudeva Vs. M/S. State Bank of Mysore and Others

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Court : Karnataka

Decided On : Jan-24-2011

Judge : S.N. Satyanarayana

Appeal No. : Writ Petition No. 28877 of 2009 (GM-DRT)

Appellant : N.B. Gurudeva

Respondent : M/S. State Bank of Mysore and Others

Advocate for Pet/Ap. : For the Petitioner: C.R. Gopalaswamy for M/s. Gopalaswamy and Assts., Advocates. For the Respondent: R2 - Chithappa, Advocate, R1 and R3-served and unrepresented.

Judgement :

(Prayer: This Petition filed under articles 226 and 227 of the constitution of India praying to quash ANX-E the dt.15.09.2009 Vide No. Nil issued by the R2 as far as the petitioner's concerned and etc.,)

1. The petitioner is challenging the notice dated 15.9.2009 issued by the 2nd respondent under Section 13 of the SERFAESI Act seeking to recover a sum of Rs.72,00,571/- from the petitioner and respondent No.3 arising in respect of loan transaction between 3rd respondent and 1st respondent.

2. Brief facts leading to this petition are as under:

G.K. Shantha Raju proprietor of 3rd respondent M/s Vinayaka Electrical Enterprises availed credit facility for his business from 1st respondent/State Bank of Mysore. The loan was availed to the turn of Rs.14,50,000/- in the year 1997. The petitioner herein stood as guarantor for the said loan transaction. Since 3rd respondent initiated proceedings for recovery in OA.No.67/2000 on the file of Debts Recovery Tribunal, Bangalore. In the said proceedings, proprietary concern of 3rd respondent herein was 1st defendant, 2nd defendant was G.K. Shantha Raju himself and 3rd defendant was petitioner herein. In the said proceedings 1st defendant M/s. Vinayaka Electrical Enterprises and its proprietor Shantharaju 2nd defendant were represented by common advocate. So far as 3rd defendant/petitioner herein was represented by a different advocate.

3. In the said proceedings, besides the aforesaid three defendants there were three other defendants who also stood as guarantors to the credit facility availed by defendants 1 and 2. During 2004 there was negotiation between creditor bank and principal borrower, who were respectively applicant and 2nd defendant in OA.No.67/2000. They entered into settlement, wherein 2nd defendant agreed to settle the entire arrears due from him to applicant by paying a sum of Rs.20,00,000/- in one lump-sum against its claim in the said application. In that behalf, a joint memo was also filed by bank and principal borrower. The memo which was filed by them before DRT was referred to Lok Adalath. When the matter came up before Lok Adalath. Bank entered appearance through its officer and its counsel on record. On behalf of defendants only 2nd principal borrower entered appearance before Lok Adalath along with his counsel. Both counsel filed joint memo, wherein 2nd defendant in OA.67/2000 agreed to pay a sum of Rs.20,00,000/- to applicant Bank in full and final settlement of all the claim made by bank against him in the said application.

4. Accordingly, a compromise petition was also filed by them before Lok Adalath, wherein under the terms and conditions of compromise petition, principal borrower was required to pay entire agreed amount of Rs.20,00,000/- within one year, failing which he would pay entire claim made in the application by bank with interest as claimed therein. By taking the said compromise petition on record, Lok Adalath closed the application filed by bank. Pursuant to that a recovery certificate

was also issued by the Recovery Officer of DRT on 23.2.2004. It is seen that pursuant to the recovery certificate issued by Recovery Officer. DRT, principal borrower did not repay the amount of Rs.20,00,000/- as agreed.

5. Therefore, the bank thereafter initiated proceedings under Section 13 of the SERFAESI Act for recovery of its entire claim made in the application in terms of compromise arrived at between principal borrower and itself in OA.No.67/2000 as agreed in the compromise petition. The issuance of notice under Section 13 of the SERFAESI Act was independent of the judgment and decree passed in OA. No. 67/2000 pursuant to the compromise entered into between creditor and principal borrower before Lok Adalath in OA.No.67/2000. Incidentally notice issued by bank under Section 13 was issued not only against principal borrower but against all other guarantors including petitioner.

6. Petitioner being aggrieved by issue of notice under Section 13 of the SERFAESI Act has come up in this writ petitioner impugning the said notice dated 15.9.2009 on the ground that he was party to the transaction between creditor and principal borrower as on the date when principal borrower took loan for business of M/s. Vinayaka Electrical Enterprises on the terms and conditions stipulated in the document executed in that behalf. It is his case that under the said agreement which was entered into between principal borrower and bank, petitioner and others stood as guarantors/surety for repayment of loan. Subsequently, the arrangement that is arrived at between bank and principal borrower in the said application amounted to novation of contract, which was entered into between bank, principal borrower and guarantors in terms of loan transaction. The said novation has taken place without reference to petitioner, he is not a party to said proceedings. He has not agreed for any settlement arrived at between principal borrower and bank in OA.No.67/2000.

Therefore, any such arrangement arrived at between them will not bind petitioner and he is not bound by the decree passed in OA.No.67/2000 pursuant to the settlement arrived at between bank and principal borrower in the said proceedings.

7. Heard the counsel for petitioner and respondents. Counsel for petitioner try to substantiate the grounds urged in this petition contending that the same is

governed by Sections 133 to 135 of the Indian Contract Act. In any loan transaction if there is variance to the terms of contract between the borrower and creditor without reference to surety, the surety gets automatically discharge and he will not be bound by any of the modified terms and conditions agreed upon between the principal borrower and conditions agreed upon between the principal borrower and the creditor without reference to the guarantor. In support of that he rely upon the following decisions.

1) Maharashtra Apex Corporation Ltd., vs. Poovappa and another -vs- Poovappa and Anr., reported in ILR 1985 karnataka 255.

2) Amrit Lal Goverdhan Lalan (dead) by his legal representative vs. State Ban of Travancore and others, reported in AIR 1968 Supreme Court 1432 (V 55 C 281)

3) Sardar Kahn Singh. Vs. Tek Chand Nanda and another, reported in AIR 1968 Jammu and Kashmir 93 (V 55 V 26)

4) M. Venkataramanaiah v. M/s Margadarshi Chit Funds and others, reported in air 2009 (NOC) 940 (A.P.) 275.

5) Kanhaiya Lal Vs. State Bank of India and others, reported in AIR 2008 Patna 153.

8. In the matter of Amrit Lal Goverdhan Lalan (AIR 1968 Supreme Court 1432 (V 55 C 281), under similar circumstances where there was variance to the terms and conditions of the contract the Apex Court has held as under:

“The act of the Bank in giving time to the principal debtor to make up the quantity of the goods pledged is not tantamount to the giving of time to the principal debtor for making the payment of the money within the meaning of Section 135 of the Indian contract Act. What really constitutes giving of time is the extension of the period at which, by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. The reason why an agreement to give time discharges the surety is because if, after making such an agreement, the creditor were to sue the surety the latter would at once be

turned on the principal debtor in breach of the agreement to give time so that the effect of such an agreement is to prevent the surety from either requiring the creditor to call upon the principal debtor to pay off the debt or himself paying off the debt, and then suing the principal debtor, thereby causing prejudice to the surety (Rouse v Bradford Banking Co., 1894-2 Ch 32 CA at p.75 per A.L.Smith, L.J)”

9. The aforesaid finding of the Apex Court is followed by the learned single judge of this Court in Maharashtra Apex Corporation Ltd., ILR 1985 KAR 255), wherein at paragraph 5 it reads as under:

“5. The Learned Counsel Sri Shivashankar Bhat then urged that the granting of installments to the principal judgment debtor was rather more beneficial to the surety and therefore it cannot be said that any prejudice was caused to the surety by the grant of installments to the principal judgment debtor and that therefore the liability of the surety did not stand discharged on account of the grant of installments to the principal judgment-debtor. Section 135 of the India Contract Act repels the said contention. Under Section 135, even if the creditor gives sometime to the principal judgment-debtor without the assent of the surety, the surety stands discharged. Sri Mallya. Learned Counsel for the L.R., of the surety quoted before me the decision in Amrit Lal Goverdhan Lal (dead) by his legal representative vs. State Bank of Travancore and others. It is clearly laid down on page 1436 as:

“The act of the Bank in giving time to the principal debtor to make up the quantity of the goods pledged is not tantamount to the giving of time to the principal debtor for making the payment of the money within the meaning of Section 135 of the India Contract Act. What really constitutes giving of time is the extension of the period at which by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. The reason why an agreement to give time discharges the surety is because if, after making such an agreement, the creditor were to sue the surety the latter would at once be turned on the principal debtor in breach of the agreement to give time so that the effect of such an agreement is to prevent the surety from either requiring the

creditor to call upon the principal debtor to pay off the debt or himself paying off the debt, and then suing the principal debtor, thereby causing prejudice to the surety.”

It is further laid down in the Supreme Court case as:

“Thus to substitute for payment in one sum payment by installments amounts to a giving of time. Again, whenever the taking of a new security from the principal debtor by the creditor operates as a giving of time, the surety is no longer liable, but not where that transaction has no such effect.”

Therefore, in view of the said Supreme Court decision, the granting of installments by the decree-holder to the principal debtor amounts to giving of time to the principal debtor. Therefore in view of the clear principle laid down by Section 135, the Trial Court rightly held that the liability of the surety stood discharged.”

The aforesaid ratio is also followed by the High Court of Andhra Pradesh in the matter of M. Venkataramanaiah (AIR 2009 NOC 940 AP, AIR 1998 J and K 93).

10. Further the petitioner also contends that when once the proceedings initiated by bank for recovery of money under DRT Act has reached finality in terms of compromise arrived at between the principal debtor and the borrower, it is not open for the bank to initiate fresh proceedings under the provisions of SERFAEI Act as held by the Patna High Court in the matter of Kanhaiya Lal (AIR 2008 Patna 153) referred to supra, the relevant portion is at page 2 and 3, which reads as under:

“2. Admittedly, there is no appeal against the original order passed in the year 2000 determining the liability. That order has attained finality and binds both Bank and the petitioner. The submission of the petitioner is that ignoring the said order Bank cannot move under the Securitisation and Reconstruction and Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as the “SARFAESI Act”) for recovery of its dues. Once bank had a statutory remedy and it availed it and let it attain finality, having thus taken the remedy to its conclusion its result cannot be discarded or ignored and proceedings afresh

started under SARFAESI Act.

3. In my view, the principles of estopped by conduct shall apply. Bank is estopped from now ignoring the order they suffered and which attained finality with regard to dispute inter se that order binds both parties. It being an order competently passed by a competent Court in a competent jurisdiction.”

11. Therefore, in the light of the aforesaid decisions counsel for the petitioner contends that notice issued by creditor bank under Section 13 of the SERFAESI Act is not binding on him for two reasons. Firstly, in view of the settlement arrived at between bank and principal borrower way back in the year 2004 which has reached finality and not being challenged or altered at the instance of bank subsequent thereto, it is not open for bank to seek recovery of said amount from petitioner as he was not a party to novation of contract between bank and principal borrower. Secondly, in view of bank having secured a compromise decree in OA.67/2000 under DRT Act, it is not open for bank to initiate proceedings under Sections 13 of the SERFAESI Act in respect of same transaction, much less against petitioner whose liability has ceased to exist as on 2004 when there is novation to contract between creditor and principal borrower has taken place.

12. Per contra, counsel for respondents 1 and 2 would try to justify the notice on the ground that though compromise was arrived at between principal borrower and creditor bank the reading of joint memo and terms of compromise decree clearly states that it binds all defendants in OA.No.67/2000. When it says all defendants, it includes 3rd defendant in the said application, who is none other than petitioner herein. Therefore, petitioner cannot deny his liability to pay the debt under aforesaid compromise petition. It is further contended that when once guarantor stood as surety for loan, till repayment of entire amount under said transaction the liability will continue and the compromise entered into between principal borrower and creditor bank will not take away the right of the creditor bank to recover the same from guarantor.

13. Alternatively it is contended by counsel for bank that merely because a compromise is arrived at in re-fixing the terms of payment of loan amount, it does not mean that guarantor will be absolved of entire liability. He will continue to be

liable for altered claim, wherein bank has given up a portion of its claim which ensures to the benefit of petitioner also, as he is guarantor and he cannot be totally absolved of the liability to pay the entire amount. It is further contended by him that if petitioner is aggrieved by compromise decree wherein the liability to pay entire debt is fastened on all defendants the petitioner ought to have challenged the said compromise decree in appropriate forum. Invoking the provisions of Article 226 of the Constitution of India in this petition is not maintainable. In support of his contention he rely upon the judgment of the Apex Court in the matter of United Bank of India -vs- Satyawati Tandon and Ors., reported in (2010) BC 495 (SC). So far as recovery certificate that was issued binding against all the respondents he rely upon the decision of the Kerala High Court in the matter of Moni Mathai and Ors, -vs- Federal Bank Ltd., Arakkunnam and Anr., reported in 2003 Kerala 164 regarding validity of compromise.

14. However, on going through the aforesaid decisions relied upon by both counsel for parties it is seen that contentions raised by bank is without basis. The facts and circumstances as set out of the decisions relied upon by the bank does not entire to its benefit. On the contrary, the finding of Apex Court on Sections 133 to 135 of the Contract Act regarding novation of contract where the parties to application entered into compromise in exclusion of guarantor will not bind guarantor so far as decree passed in the said proceedings, is found to be valid and bonafide. In the facts and circumstances of the case this Court holds that the liability of guarantor in view of compromise between principal borrower and creditor bank in OA.No.67/2000 has come to an end and that petitioner as guarantor is absolved of liability in respect of the claim in proceedings in OA,No.67/2000 much less the amount quantified in pursuance to compromise decree in the said proceedings. In view of that it is not open to bank to initiate proceedings against petitioner either by billing petitioner or by initiating proceedings under Section 13 of SERFAESI Act for recovery of aforesaid amount by attaching property belonging to petitioner.

15. Further, regarding the contention that petitioner herein is not entitled to challenge the notice under SERFAESI Act in this writ petition, in the light of Satyawati Tandon's case this Court that the ratio laid down by Apex Court in the

aforesaid decision does not apply to the facts of this case. In the instant case, what is challenged is the right of the Bank to initiate proceedings for recovery of due pursuant to compromise arrived at between the Bank and principal borrower, as if the said amount is due under original loan transaction which the Bank can recover by initiating appropriate proceedings under SARFAESI Act. Therefore, the notice issued by the respondent/bank under Section 13 of SERFAESI Act to the petitioner herein vide Annexure-E to this petitioner is without basis on the same is required to be quashed.

16. In the result, the petition is allowed. Notice dated 15.9.2009 vide Annexure-E is quashed. Parties to bear their own costs.

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