
(2015) 10 CAL CK 0057

In the Calcutta High Court

Case No : GA 2247 of 2014 and CS 262 of 2014

Abhishek Bose and Others

APPELLANT

Vs

IDBI Bank Ltd. and Others

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Contract Act, 1872 — Section 128
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14, 17

Citation : (2015) 10 CAL CK 0057

Hon'ble Judges : Arijit Banerjee, J.

Bench : Single Bench

Advocate : Debnath Ghosh, Indranil Karfa and Jayanta Sengupta, Advocates, for the Appellant; Amiya Kumar Sur and Biplab Ghosh, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Arijit Banerjee, J.—In the above suit, the plaintiffs/petitioners have claimed, inter alia, declaration that a deed of mortgage dated 31st May, 2013 executed by the plaintiffs in favour of the defendant Nos. 1 and 2 as also a personal guarantee dated 1st February, 2013 executed by the plaintiff No. 1 in favour of the defendant Nos. 1, 2 and 3 are null and void and for consequential reliefs of delivery up and cancellation of the said documents and perpetual injunction restraining the defendants from claiming any right under the said documents. In the suit the present application has been taken up praying for the following orders:-

"(a) Injunction restraining the respondent Nos. 1 and 2 or any of them from claiming any right under the Deed dated 31st May, 2013;

(b) Injunction restraining the respondents from giving any effect to the deed dated 31st May, 2013 or the personal guarantee dated 1st February, 2013;

(c) Injunction do issue restraining the respondents, their men, agents and/or servants from taking any coercive steps in respect of the personal guarantee dated 1st February, 2013 and Security Deed dated 31st May, 2013;

(d) Ad interim orders in terms of prayer above;"

The petitioners' case:-

2. The proforma respondent is a closely held limited company engaged in the business of manufacture and sale of rubberized products. The petitioner Nos. 1 and 2 are the directors/promoters of the proforma respondent (hereinafter referred to as "the company").

3. The respondent Nos. 1, 2 and 3 are amongst the existing bankers of the company.

4. From time to time, the company obtained credit facility from the respondent No. 1. Such credit facility was secured by way of mortgage by deposit of title deeds of an immovable property situated at 122-130 S.M. Bose Road, Panihati Municipality, North 24 Parganas. Further, a personal guarantee was also executed in favour of the respondent No. 1 by Debabrata Bose, a director of the company. Security was also created in favour of the respondent No. 1 by way of hypothecation of stocks, book debts, current assets and plant and machinery of the company. After the demise of the said Debabrata Bose, a corporate guarantee was furnished by one Cachet Waterproof Pvt. Ltd. in the year 2009.

5. The company also obtained financial assistance from the respondent No. 2 which was secured by way of hypothecation of stocks, book debts, current assets and first charge on the company's plant and machinery as well as pari passu charge/mortgage on the company's properties situated at Panihati.

6. The financial assistance provided by the respondent No. 3 was secured by way of mortgage of the company's immovable properties situated at S.M. Bose Road, Panihati, ranking pari passu with each of the respondent banks.

7. Value of the said property of the company was approximately Rs. 40.00 crores as in May, 2008 as would appear from a report submitted by an empanelled valuer of the respondent No. 1 (page 92 of petition). Over the years the value of the said property has obviously appreciated to a great extent and is enough to cover the liability of the company to the respondent banks.

8. In the year 2008-09 recession hit the global market resulting in working capital crisis for the company. To overcome such crisis the company sought for help and support from the respondent banks by way of restructuring of existing debts and disbursement of fresh working capital. The same was proposed to safeguard both the interests of the company as well as the interests of the banks so that the company could continue to carry on business and pay all the dues of the banks.

9. In spite of requests made by the company, timely steps were not taken by the

respondent Nos. 1 and 2 and the financial condition of the company deteriorated so much that the bank account of the company with the respondent No. 2 was declared as Non-Performing Asset (in short NPA) on 25th December, 2010 and the bank account of the company with the respondent No. 1 was declared as NPA on 31st December, 2010.

10. As on the dates of declaration of company's bank accounts as NPA, the banks held pari passu the following securities:-

(a) Mortgage on the S.M. Bose Road property at Panihati, North 24 Parganas.

(b) Corporate guarantee of Cachet Waterproof Pvt. Ltd.

(c) Hypothecation of stocks, book debts and other current assets of the company.

(d) Hypothecation of plant and machinery, furniture and fixtures and other fixed assets of the company.

11. Subsequently, several discussions were held between the company and the representatives of the respondent Nos. 1 and 2 for resumption of the business operations of the company.

12. At a meeting of the consortium of banks held on 10th February, 2011, the respondent Nos. 1 and 2 proposed the corporate debt restructuring (in short CDR) of the company for its revival. Although the petitioners were not present at such meeting, minutes of the meeting were made over to the company by the respondents subsequently. From such minutes it would be evident that the respondent Nos. 1 and 2 expressed that for the CDR to be effectively implemented, the promoters of the company had to infuse further funds into the company. The company agreed to implement the proposal of CDR as suggested by the respondent Nos. 1 and 2. The promoters of the company including the petitioners infused a sum of Rs. 7.5 crores into the company. The said fund has been subsequently converted into equity as per terms of CDR package.

13. Thereafter, a reference was made to the Corporate Debt Restructuring Cell.

14. For the purpose of Corporate Debts Restructuring the Company was required to appoint a consultant. IDBI capital marketing services Ltd., was appointed as a consultant by the company on the suggestion of the respondent No. 1. A flash report was prepared and a decision of the CDR Cell for corporate debt restructuring of the company was taken to obtain personal guarantees from the directors of the company and to have some additional security for the proposed enhanced financial limit. This would appear from the letter dated 22nd July, 2011 issued by the CDR Cell (at page 121 of petition).

15. Subsequently, several meetings were held and a scheme for restructuring was prepared by the consultant which was sanctioned by the CDR Cell by its letter dated 13th April, 2012. The sanction letter required furnishing of personal guarantees by the petitioner No. 1 along with further collateral security to the extent of fresh funds agreed to be released.

16. The petitioner No. 1 provided a personal guarantee dated 1st February, 2013 in favour of the respondent banks securing all amounts payable by the company under the Master Restructuring Agreement which was executed as part of the CDR documentation. A corporate guarantee was also provided by Cachet Waterproof Pvt. Ltd. The petitioners provided interest free unsecured loan to the tune of Rs. 243.75 lakhs approximately.

17. In a compliance of the CDR, the petitioners also took steps to create a security interest in their residential property situated at Sarat Bose Road, Calcutta. Accordingly, a deed of simple mortgage dated 31st May, 2013 was executed in favour of the respondent banks. It would be evident from the said document that the same was prepared on the basis of proposed disbursement of fresh funds by the banks to the company. Hence, the said document was effective only with regard to the fresh funds which were to be provided by the banks under the CDR package.

18. From a letter dated 21st December, 2013 issued by the respondent No. 1 the petitioners claim to have learnt that the company had been removed from the CDR at a meeting held on 11th December, 2013 for alleged failure on the part of the company to service the loan advanced by the banks. By the said letter the respondent No. 1 demanded payment of Rs. 2235.94 lakhs within 15 days failing which the respondent No. 1 threatened to take measures for enforcing the securities. This was followed by a similar letter dated 9th January, 2014 issued by the respondent No. 1. It is evident that the respondent No. 1 was the monitoring institution on whose recommendation the CDR package was withdrawn.

19. From the aforesaid the following would transpire:

(a) Personal guarantee was given subject to the condition that the banks would disburse fresh funds and implement the CDR package.

(b) Mortgage deed dated 31st May, 2013 was executed to secure only fresh funds which were to be provided under the CDR as would appear from Clause B of the simple mortgage deed (pg. 268 of petition).

(c) The collateral as security already lying with the banks for existing loans/ outstandings were sufficient to secure the respondent banks with regard to the facilities provided by them to the company prior to the CDR.

(d) The CDR package contemplated disbursement of fresh working capital by the banks to the company to the tune of Rs. 1499.12 lakhs which admittedly was not disbursed.

20. In the aforesaid factual scenario the instant suit has been filed.

21. The petitioner No. 1 provided the personal guarantee dated 1st February, 2013 and the petitioners executed the simple mortgage deed dated 31st May, 2013 upon the sanction of CDR package and as part of the CDR documentation

and as a condition of CDR package. The CDR package has been withdrawn without providing any fresh funds to the company. The deed of guarantee as well as the mortgage deed both provided that the documents were executed to secure the fresh funds which were to be disbursed under the CDR package.

22. The petitioner No. 1 has received a letter dated 8th March, 2014 issued by the respondent No. 1 purportedly under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SAEFAESI Act). In the said letter the property which is the subject matter of the simple mortgage deed dated 31st May, 2013 has been illegally mentioned as a security.

23. Under the SARFAESI Act, there cannot be any debt with regard to the fresh funds promised under the CDR package which admittedly was not disbursed. To the extent of such non disbursed fresh funds, the bank is not a creditor. Accordingly, there is no debt and, hence, there is no security interest within the meaning of Section 2(zf) of the SARFAESI Act.

24. Furthermore, the company's accounts were declared as NPA in December, 2010 and subsequent thereto the company did not incur any fresh debt. It is obvious that the respondent bank has also not considered the simple mortgage deed dated 31st May, 2013 or the personal guarantee dated 1st February, 2013 as security. These security documents were executed only to secure subsequent financial assistance which has no link to any earlier facilities provided by the banks. Had there been no proposal for disbursement of fresh funds to the company and implementation of the CDR package, the question of providing any personal guarantee or executing any mortgage deed would not have arisen.

25. As regards the question as to whether or not the claim of the petitioners" is maintainable in view of the provisions of the SARFAESI Act, the petitioners submitted that on the CDR package being withdrawn without disbursement of any fresh funds, the documents executed by the petitioners for securing the proposed fresh funds could not be given effect to. Hence, the SARFAESI Act would not be applicable to the transaction between the petitioners and the respondent banks.

26. Regarding the contention of the respondents that the petitioners should approach the DRT, the petitioners contended that no steps have been taken nor can be taken under the SARFAESI Act as regards the documents which formed the subject matter of the present suit. The DRT or the Appellate Tribunal is not empowered to adjudicate the disputes between the parties in the present suit.

27. In this connection the petitioners have relied on a decision of the Hon"ble Supreme Court in the case of Standard Chartered Bank Vs. V. Noble Kumar and Others, wherein it has been held that only on the bank obtaining physical possession of the security under Section 13 and/or 14 of the SARFAESI Act, an aggrieved person is entitled to approach the DRT under Section 17 of the Act. In the present case, physical possession not having been taken by the banks, the petitioners cannot approach DRT under Section 17 of the SARFAESI Act.

28. It was further contended that the reliefs claimed in the suit cannot be granted by the DRT or the Appellate Tribunal. The tribunal does not have the power or jurisdiction to declare the documents dated 1st February, 2013 and 31st May, 2013 as null and void. This court has been called upon to decide as to whether the said documents are valid documents or can be given effect to in the light of the CDR package which proposed disbursement of additional funds, not being acted upon. It was submitted that this claim of the petitioners cannot be properly adjudicated by the tribunal since the petitioners' claim would then be dependent on the action and/or claim by a bank and not independently. There is no adequate remedy available to the petitioners under the SARFAESI Act or the DRT Act and, hence, the civil courts and their power cannot be restrained or curtailed. In this connection the petitioners relied on a decision of this court in the case of *Prabir Chatterjee Vs. ICICI Bank Limited and Others*, . In the said case, this court held that the tribunal was constituted with a specific purpose as is evident from its statement of objects. The Preamble of the Act also is a pointer to the same. On a proper reading of the scheme of the Act, it will be seen that the tribunal has a limited jurisdiction. Under the Act, as it originally stood, it did not have even any power to entertain a claim of set-off or counter-claim. No independent proceedings can be initiated before the tribunal by a debtor. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for enforcement of that right. Jurisdiction of a civil court is barred only in respect of matters which strictly come within the purview of Section 17 of the Act and not beyond the same. The civil court, therefore, will continue to have jurisdiction. The tribunal does not have the plenary power to receive all civil actions pertaining to disputes between banks and their constituents. Suits filed in civil court by constituents cannot be directed to be transferred to the tribunal, though an issue involved in the suit may be decided as between the parties in the bank's application before the tribunal and, to such extent, operate as issue estoppel. If there is no adequate remedy available before a tribunal to a constituent, the civil court can scarcely shoo away a constituent who has instituted an action before it on the ground that the subject matter of the action is inextricably linked to the claim made by a bank or financial institution before the tribunal under the 1993 Act.

Contention of the respondent No. 1:-

29. The respondent No. 1 contends that since admittedly the petitioner Nos. 1 and 2 are directors/promoters of the proforma respondent, Section 128 of the Indian Contract Act, 1992 comes into play. Section 128 of the Indian Contract Act provides that the liability of the surety is co-extensive with that of a principal debtor, unless it is otherwise provided by the contract. Reliance has been placed on a decision of the Hon'ble Supreme Court in the case of *Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjunwala*, wherein the Hon'ble Supreme Court held that the liability of the guarantor and principal debtor is co-extensive and not in the alternative. The Apex Court referred to Halsbury's Laws of England, 4th Ed. Vol. 20 Para 159 wherein it is stated that it is not necessary for

the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him although solvent, unless this is expressly stipulated for.

30. Reliance was also placed on a judgment of the Hon''ble Supreme Court in the case of Ram Kishun and Others Vs. State of U.P. and Others, , wherein it was observed that the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery pursuing his remedies against the principal debtor at his instance.

31. Reliance has also been placed on a decision of the Hon''ble Supreme Court in the case of United Bank of India Vs. Satyawati Tondon and Others, , in respect of the proposition that the creditor bank may proceed against the guarantor directly without first initiating action against the borrower. The Hon''ble Apex Court held that the High Court erred in restraining the creditor bank from taking action in furtherance of its notice under Section 13(4) of the SARFAESI Act.

32. It was then submitted that in a recent judgment in the case of Jagdish Singh Vs. Heeralal and Others, , the Hon''ble Supreme Court held that in view of Sections 13(4) , 17 , 34 and 35 of the SARFAESI Act, the jurisdiction of the civil court is ousted. Section 34 ousts jurisdiction of the civil court in respect of any matter which the DRT or the Appellate Tribunal is entitled to determine. It was then submitted that similar views have been taken by different High Courts in the following cases:-

(a) K.R. Radhakrishnan vs. K & N Trade reported in (2013) 1 Bankers'' Journal 502.

(b) Pannalal Bansali vs. Axis Bank Ltd. reported in (2013) 1 Bankers'' Journal 203.

(c) Sasi and Another Vs. Housing Development Finance Corporation Ltd. and Others, .

(d) Vicky Kumar Rana Vs. Kamal Kumar Nangia and Others, .

33. In the aforesaid cases, various High Courts have held that no order of injunction should be passed restraining a creditor bank or financial institution from taking steps against a borrower in default under the provisions of the SARFAESI Act or the DRT Act.

34. It was submitted that the IDBI bank has taken measures under Section 13(2) of the SARFAESI Act, 2002 by classifying the bank's account as non-performing asset on 25th December, 2010. By the notice of that date IDBI had given sixty days time to the borrower and guarantors to discharge the liabilities in full failing which the secured creditors would be entitled to take steps under

Section 13(4) of the SARFAESI Act.

35. When the present application was moved, by an order dated 7th July, 2014 this court recorded that the defendant banks would be at liberty to proceed under the SARFAESI Act but shall not take any step more than symbolic possession of the property in question till the questions raised in the application are resolved by this court.

36. It was contended that the additional collateral securities furnished by the petitioners were not in terms of CDR package but were meant to be securities for the entire outstanding loan. The petitioners were required to pay Rs. 2235.94 lacs as on 1st December, 2013 and further interest which is accruing everyday. IDBI bank is dealing with public funds. If recovery of public money is not properly made, not only the bank will suffer but the pace of development in the country will be adversely affected. The banks and financial institutions deal with public money and their approach has to be public oriented. In the case of Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , it was observed by the Hon'ble Supreme Court that a financial corporation can operate effectively only if there is regular realization of loans advanced to parties. While the corporations are expected to act fairly in the matter of disbursement of loans, there is a corresponding duty cast upon the borrowers to repay the installments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and nonpayment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame it will disturb the equilibrium of the financial arrangements of the corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intending borrowers with the available finance. Non-payment of the installment by a defaulter may stand in the way of a deserving borrower getting financial assistance.

37. It was further contended that the petitioner No. 1 has sent its objection against the notice under Section 13(2) of the SARFAESI Act which shows that the petitioner No. 1 is keen to contest the proceedings before the DRT as this court has no jurisdiction to entertain or adjudicate the grievance of the petitioners in view of Section 34 of the said Act which ousts the jurisdiction of civil courts.

38. Some of the unsecured creditors of the respondent No. 4 company have filed winding up applications before the Ld. Company Judge of this court. By an order dated 10th February, 2014 this court directed the company to be wound up. By filing winding up petitions, unsecured creditors are realising their dues from the company whereas a secured creditor like IDBI Bank is left in the lurch. No impediment should be put on the way of the secured creditors like the defendant banks realizing their dues from the borrower and the guarantors by taking steps under the SARFAESI Act and/or DRT Act and the present application should be dismissed.

Contention of the petitioners" in-reply:-

39. Section 128 of the Contract Act is related to the liability of a surety viz-a-viz the principal debtor and not with regard to the liability of a director/promotor of a company viz-a-viz the principal debtor where such debtor is the company. In the case of Industrial Investment Bank of India Ltd. vs. Biswanath Jhunjhunwala (supra) referred to by IDBI Bank, the question that arose for determination was whether or not a guarantor can be proceeded against without the principal debtor being proceeded against. This is not the case in the present application.

40. The proposition in the case of Ram Krisna vs. State of Utter Pradesh, supra, is also the same. In that case it was in dispute as to whether or not the creditor has a right to obtain a decree against the surety without exhausting his remedy against the principal debtor. This, however, is not the dispute raised by the petitioners in the present application. Whether the petitioners are guarantors or not is a question which is required to be determined in the suit. No application has been made for rejection of the plaint. Therefore, the case made out in the plaint and instant petition is to be taken as true and correct. The bank has also referred to the decision in the case of United Bank of India vs. Satyawati Tondon (supra) which is on the same proposition and the same is, therefore, not applicable to the facts and circumstances of the instant case.

41. Reference to the decision in the case of Jagdish Singh vs. Heeralal, supra, is also not apt. The question in the present suit is whether or not subsequent to the declaration of an account as NPA and of a prospective CDR package being introduced, the documents/instruments executed pursuant to such CDR package can be given effect to without the CDR package being implemented. The question is whether the subject matter of the suit could at all be considered as a security. Such question is outside the ambit and purview of the SARFAESI Act. Furthermore, the scope of Section 17 of the said Act is not applicable since no steps had been taken under Section 13(4) of the SARFAESI Act at the time when the suit was instituted. The DRT or the Appellate Tribunal is not empowered to determine the issues which are before this court. In paragraphs 21, 23 and 24 of the judgment in the case of Jagdish Singh (supra), the Hon''ble Apex Court has held that it is only in respect of the matters which the DRT or the Appellate Tribunal are empowered to decide that the civil courts have no jurisdiction. In the present case, when IDBI Bank had classified the account of the proforma respondent as NPA, the documents which are the subject matter of the present suit were not even in existence.

42. The order of 7th July, 2014 passed by the Hon''ble Justice I.P. Mukerji took into consideration the judgment in the case of Nobel Kumar (supra) which allowed a person to approach the DRT only upon physical possession of the property being taken. The Hon''ble Judge, therefore, prevented the bank from taking any action which would have the effect of non-suiting the petitioners. By implication it is obvious that an aggrieved person cannot be kept remediless pending actual possession being taken of a property which is not a security against any credit facility.

43. It is disputed that the restructuring scheme could not be implemented due to non-compliance by the petitioners. In any event, it is an admitted position that there has been no disbursal of fresh funds under the CDR scheme which was sought to be secured by way of personal guarantee and the purported mortgage deed executed by the petitioners on the basis of false representation made by the bank. It would appear from the deed of mortgage itself that the same was only for fresh funds that was proposed to be provided by the banks. The present suit does not prevent the IDBI bank from recovering public funds. However, the bank has to act in accordance with law. The purported documents which are challenged in the suit are not securities and the attempt to proceed on the basis of such documents against the petitioners is not an act in accordance with law.

44. The reply given by the petitioner No. 1 to the notice issued by the bank under Section 13(2) of the SARFAESI Act does not in any manner prove that he is keen to contest the proceedings before the DRT. It is a statutory right of the petitioner No. 1 to give reply to any such notice under Section 13(2) of the SARFAESI Act.

45. The submissions of the bank in relation to company proceedings having been initiated against the proforma respondent are dehors the pleadings of the defendant bank. In any event, the same are of no consequence or relevance in the present proceeding as the same relate to the company and not to the petitioners.

Court's View:-

46. I have considered the rival contentions of the parties.

47. The first question that arises for determination is whether or not the instant suit and the application are maintainable in view of the provisions of the DRT Act and the SARFAESI Act. In the case of Jagdish Singh (supra) the Hon'ble Supreme Court has held that the jurisdiction of the civil court is ousted only in respect of matters which the DRT or the Appellate Tribunal have power to decide. There is no blanket or absolute ouster of the civil courts jurisdiction. Hence, what is to be seen is whether the DRT or the Appellate Tribunal is empowered to adjudicate upon and decide the issues raised in the suit. If the answer is in the affirmative, then I have to hold that the instant suit is barred by law. However, if the answer in the negative it cannot be said that the suit is not maintainable.

48. The plaintiffs have claimed a declaration that the deed of mortgage dated 31st May, 2013 and the personal guarantee dated 1st February, 2013 are null and void and for delivery up and cancellation of the said documents and perpetual injunction restraining the defendants from claiming any right under the said documents. In my view, it is not within the power or competence of the DRT or the Appellate Tribunal to decide whether or not the plaintiffs are entitled to such reliefs. In other words, the subject matter of the suit is not one which the DRT is competent to adjudicate upon. Hence, prima facie, I am of the view that the suit is maintainable. Jurisdiction of a civil court has been ousted only in

respect of matters which come within the purview and ambit of Section 17 of the DRT Act. The tribunal is a creature of statute and its powers are circumscribed by statute. It cannot transgress beyond the four corners of the statute. It does not have the power or jurisdiction to decide any and all kinds of disputes between a debtor and a creditor bank or financial institution.

49. Furthermore, admittedly physical possession of the property which is the subject matter of the deed of mortgage, has not been taken by the defendants till date. As such, in view of the decision of the Hon"ble Supreme Court in the case of Nobel Kumar (supra), the plaintiffs have no right to approach the tribunal. Hence, as of now, the plaintiffs have no remedy before the tribunal. A situation cannot be countenanced where a constituent of a bank has a grievance against the bank but has no forum before which such grievance can be ventilated. If a remedy is not available to the constituent before the tribunal, civil court will not non-suit the plaintiffs only on the ground that the subject matter of the suit may be connected with the bank's claim which the bank may seek to enforce before the tribunal.

50. As observed by this court in the case of Prabir Chatterjee (supra) a debtor may have an independent right against the creditor bank under the common law of contract as also in terms of the loan agreement. No special forum has been created for enforcement of such right. The civil court will continue to have jurisdiction to entertain actions brought by the aggrieved debtor to enforce such rights.

51. The decisions relied upon by Ld. Counsel for the respondents, do not really help them. The judgment in the case of Jagdish Singh (supra) does not come to the aid of the respondents since in my view the DRT or the Appellate Tribunal is not empowered to determine the issues raised in the suit. Hence Section 34 of the SARFAESI Act is not a bar to this court entertaining this suit.

52. The decisions of the four High Courts relied upon by Ld. Counsel for the respondents also are of no help to them. The plaintiffs are not claiming any injunction restraining the creditor banks from taking steps against them under the provisions of the SARFAESI Act or the DRT Act.

53. There can also be no dispute with the proposition that the liability of a surety is coextensive with that of a principal debtor. This is not an issue that arises for determination in the instant case. Hence, the decisions of the Hon"ble Supreme Court in the cases of Industrial Investment Bank of India Ltd. (supra), Ram Krisna (supra) and United Bank of India (supra) are not germane for the present purpose.

54. The reliance by the respondents on the Supreme Court decision in the case of Haryana Financial Corporation (supra) is misplaced. The plaintiffs are not seeking an order restraining the banks from realizing their dues from the defendant No. 4. The contention of the plaintiffs is that the defendant banks cannot claim any right under the personal guarantee dated 1st February, 2013

and the deed of mortgage dated 31st May, 2013. The plaintiffs do not seek any order to restrain the defendant banks from proceeding against the other securities furnished in favour of the banks.

55. For the reasons aforesaid, I am of the view that this suit is maintainable and is not barred by Section 34 of the DRT Act or any provision of the SARFAESI Act.

56. The second question that arises is whether or not the plaintiffs are entitled to the interlocutory injunctions prayed for in the present application.

57. The plaintiffs' specific case is that the personal guarantee dated 1st February, 2013 and the deed of mortgage dated 31st May, 2013 were executed for the purpose of securing the fresh funds that the defendant banks agreed to advance by way of loan to the proforma defendant under the CDR Package. The said two documents, according to the plaintiffs, were executed as security for the additional working capital that the banks agreed to provide under the CDR. However, the defendant banks contended that the said personal guarantee and the said mortgage deed were executed for securing not only the additional working capital facility but for the purpose of restructuring of the entire debt of the proforma defendant. In other words, according to the defendant banks the said two documents were executed to secure the entire dues of the proforma defendant to the defendant banks. Let us see if the said two documents themselves can throw any light on this disputed question.

58. Copy of the personal guarantee dated 1st February, 2013 executed by the plaintiff No. 1 in favour of the defendants is Annexure K to the petition. At internal page 2 of the said document, in clause C it is stated that one of the terms and conditions of the Master Restructuring Agreement, Facility Agreement and the CDR Package is that the Borrower shall procure in favour of the CDR Lenders, personal guarantee from the promoter-working directors of the Borrower, guaranteeing repayment of all amounts of the facilities and other monies payable or reimbursable by the Borrower under the CDR documents. At internal page 3 of the said document it is, inter alia, stated that in consideration of the CDR Lenders having, at the request of the Guarantor, agreed to the restructuring of certain debts obligations of the Borrower and granting of fresh funds in terms of CDR Package, the Guarantor irrevocably, absolutely and unconditionally guarantees, assures, agrees, undertakes and confirms to the CDR Lenders that in the event of any default on the part of the Borrower in payment/repayment of any of the monies referred to above or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Master Restructuring Agreement, the Guarantor shall, on demand forthwith pay to the Lender without demur all the amounts payable by the Borrower under the Master Restructuring Agreement. At internal page 6 of the document, in clause 22 it is stated that the liability of the Guarantor shall not exceed the payment of all amounts of the facilities under the CDR documents plus all interests, liquidated damages, costs, charges and other

monies payable by the Borrower to the Lender under the Master Restructuring Agreement.

59. From the aforesaid statements in the guarantee document it, prima facie, appears that the said document was executed in contemplation of the defendant banks providing additional working capital to the proforma defendant. It appears that the said personal guarantee was furnished by the plaintiff No. 1 to secure additional working capital that was to be disbursed by the defendant banks to the proforma defendant under the CDR Package. It appears to me that it was the promise of the defendant banks to provide additional working capital to the proforma defendant that prompted and induced the plaintiff No. 1 to execute the said personal guarantee in favour of the defendant banks. In other words, if the defendant banks did not make any such promise or representation, the plaintiff No. 1 would not have executed the said guarantee document.

60. Similarly, looking at the simple mortgage deed dated 31st May, 2013 executed by the plaintiffs in favour of the defendant Nos. 1 and 2 (copy whereof is Annexure "O" to the petition), one finds that it is stated that the Borrower has agreed to borrow from the mortgagees and the mortgagees have agreed to lend and advance to the Borrower the Fresh Limit on certain terms and conditions one of which is that the Borrower shall cause to secure the same by a mortgage and charge on the scheduled property. At internal page 3 of the said document in clause B it is stated that in consideration of the Fresh Limit advanced by the mortgagees to the borrower, the mortgagees being the promoters and/or directors of the borrower hereby mortgage the scheduled property, as a collateral security for securing repayment of the fresh limit along with interest.

61. Thus, it appears that the deed of mortgage was executed by the plaintiffs in consideration of the defendant banks agreeing to provide additional working capital to the proforma defendant under the CDR Package by way of sanctioning a fresh credit limit. To my mind, the plaintiffs would not have executed such deed of mortgage had the banks not promised to provide additional working capital under the CDR Package.

62. In my opinion, both the personal guarantee and the mortgage deed were executed by the plaintiffs in consideration of the defendant banks disbursing additional working capital to the proforma defendant under the CDR Package. The said two documents were meant to secure the enhanced fresh credit limit and not the debts of the proforma defendant to the defendant banks as they stood prior to sanctioning of the CDR Package. I am inclined to accept the submission of the plaintiffs that the personal guarantee dated 1st February, 2013 and the simple mortgage deed dated 31st May, 2013 were executed upon sanctioning of CDR Package and as part of the CDR Package documentation and as a condition of CDR Package. Both the documents appear to have been executed to secure fresh funds which were to be disbursed under the CDR Package.

63. It is also pertinent to note that the company's bank account was declared as NPA in December, 2010 and subsequent thereto no fresh debt was incurred by the proforma defendant vis-?-vis the defendant banks. The personal guarantee and the simple mortgage deed in question were not in existence at that point of time and hence, the banks could not have considered the same as security for the financial facilities provided by them up to that date. I am inclined to agree with the submission of the plaintiffs that the said two security documents were executed only to secure subsequent financial assistance and the same are not linked to any earlier facilities provided by the banks.

64. Admittedly, no fresh funds were disbursed by the defendant banks to the proforma defendant and the said CDR Package was withdrawn. The plaintiffs contended that banks withdrew the package arbitrarily and without any justifiable reason. The defendant banks contended that the package could not be implemented due to non-compliance of its terms and conditions by the plaintiffs and the proforma defendant. It is not necessary for me to go into the question as to why or for what reason the CDR Package was not implemented. The fact remains that no fresh funds were disbursed by the defendant banks to the proforma defendant.

65. Even if it is accepted that the personal guarantee and the deed of mortgage were meant to secure the entire dues of the defendant banks including their dues prior to the sanctioning of the CDR Package, I am of the view that the said two documents would have become effective only upon disbursement of fresh/additional working capital by the defendants to the proforma defendant under the CDR Package. Admittedly there was no such disbursement. Hence, in my opinion, no effect can be given to the said two documents. Whether or not non-implementation of the CDR Package was due to defendants on the part of the plaintiffs and the proforma defendant or was due to arbitrary decision on the part of the defendant Banks can only be decided at the trial of the suit.

66. Since, the said personal guarantee and the mortgage deed were executed on condition that the defendant banks will disburse additional working capital to the proforma defendant and since no such funds were, in fact, disbursed by the defendant banks, prima facie, the defendant banks are not entitled to claim any right under the said two documents. In my opinion, the plaintiffs have made out a prima facie case in support of their claim for interlocutory relief, a case that deserves to go to trial.

67. The balance of convenience also appears to be in favour of interim injunctions being granted as prayed for. In my opinion, the prejudice that the plaintiffs will suffer if the defendant banks are allowed to enforce the two securities in question and in the event the plaintiffs ultimately succeed at the trial of the suit will be far greater than the prejudice that the defendant banks may suffer if they are presently restrained from enforcing those two securities even if they succeed at the trial of the suit. Further, the defendant banks appear to be holding other securities of substantial value covering their entire claim.

68. In view of the aforesaid, this application succeeds. There shall be an order in terms of prayers (a) and (b) of the notice of motion. However, it is made clear that this judgment and order shall not prevent the respondent Banks from proceeding against other securities that they are holding in connection with loans advanced to the proforma defendant or from taking any other legal steps against the plaintiffs or the proforma defendant, if they are entitled to do so in law. In the facts and circumstances of the case, there shall be no order as to costs.

69. The hearing of the suit is expedited. The defendants will file written statement if not already filed within six weeks from date. Cross order for discovery of documents within two weeks thereafter. Parties will be at liberty to mention before the appropriate bench once the suit is ready for hearing.

70. GA 2247 of 2014 is accordingly disposed of.