(2025) 01 DRAT CK 1670

In the Debts Recovery Appellate Tribunal, Chennai

Case No : RA No. 151 & 152 Of 2017

B S Rajnarain APPELLANT

Vs

Axis Bank Limited RESPONDENT

Date of Decision : 10-01-2025

Acts Referred:

Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 — Section 20
Contract Act, 1872 — Section 62, 129, 130, 133

Citation : (2025) 01 DRAT CK 1670

Hon'ble Judges : G. Chandrasekharan, Chairperson

Bench : Single Bench

Advocate : M/s BFS Legal, M/s M.R. Uma Vijayan & Co

Final Decision : Dismissed

Judgement

G. Chandrasekharan, Chairperson

1. These appeals are filed under Section 20 of the RDDB & FI Act, challenging the order passed in OA 237/2015 dated 7.10.2015 on the file of DRT-II, Chennai.

2. Appellants are Defendants 4 and 5 in OA No.237/2015 on the file of DRT-II, Chennai who filed these appeals separately against the Order passed in the said OA on 07.10.2015.

3. The first respondent bank in these appeals filed OA 237/2015 against defendants 1 to 5seeking to recover Rs.25,44,107.25p along with interest at 15.25% per annum with monthly rests from the date of OA till the date of realisation, together with costs from the defendants 1 to 5 jointly and severally.

4. The first defendant in the OA viz., M/s Brand Portrait Consulting Private Limited is a Private Limited Company and defendants 2 to 5 are its Directors. The Directors bound themselves as Directors and in their individual capacity to repay the loan advanced to the first defendant company to the tune of Rs.25.00 lakhs sanctioned vide sanction letter dated 25.7.2007. This amount was not paid,

therefore, the applicant bank (R1 bank herein) issued legal notice dated 12.04.2010 to the defendants to pay the entire dues. When there is no response from defendants, OA was filed for recovery of above said amount.

5. It appears that the appellants in these appeals, who are defendants 4 and 5 in the OA, have not filed their written statements. Further, they have not produced any evidence before the Tribunal. The first Respondent bank produced Ex.A1 to A11 in proof of its claim. On the basis of the oral and documentary evidence produced, Ld. Presiding Officer allowed the OA claim and held that first respondent bank is entitled to recover a sum of Rs.Rs.25,44,107.25p with further interest at 12% per annum (simple) from the date of OA till the date of realization from defendants 1 to 5 jointly and severally.

6. Challenging this Order, these appeals i.e. RA 151/2017 and RA 152/2017 are filed by Defendants 4& 5 viz., Mr.B.S.Raj Narain and Mr. C. ARo Taffline respectively.

7. Ld. Counsel for the appellants submitted that appellants are signatories to the loan sanction proceedings dated 27.07.2007 and appellants also gave personal guarantee to the loan on 27.07.2007. It is further submitted that on 22.2.2008 and 25.02.2008 through a letter sent to Mr.Venugopal Nayar, Subash Rambhav Bhokre, the other Directors, appellants in these appeals had resigned from their position of Directors. This resignation was informed to the first Respondent bank through e-mail dated 22.02.2008. After resignation of the appellants, first Respondent bank had entered into a fresh and new agreement with the borrower company, and other directors altering the terms of the earlier contract. The rate of interest was enhanced from 13.5% - 15% to 14.25% - 15.75%. Thus, through this new agreement, the appellants are exonerated from paying the loan on the principle of novation.

8. It is further submitted that appellants were not given opportunity for producing evidence before the Tribunal. If there is change in the contract without the concurrence and confirmation of sureties, sureties can be discharged in terms of Section 133 of Indian Contract Act. Thus contending, Ld. Counsel for appellants prays this Tribunal to set aside the order of Ld. Presiding Officer, DRT-II, Chennai dated 7.10.2015 and allow these appeals.

9. Refuting the submissions of the Ld. Counsel for the appellants, Ld. Counsel for first respondent bank submitted that when the loan was sanctioned to the 1st defendant company, now 2nd respondent in these appeals, appellants were the Directors. The appellants had signed in the sanction letter not only as Directors of the 2nd respondent company, but also in their individual capacity.Covenant ' h' of the sanction proceedings dated 25.7.2007 mentions that, "The firm/concern/ company should not make any drastic changes in its management set up without the bank's permission'. It is further submitted that, in the Demand Promissory Note executed in support of the loan advanced to the 2nd respondent company, the appellant Shri B.S. Raj Narain has signed as a Director and in his individual

capacity.

10. It is further submitted that the appellants have also given personal guarantee on 27.07.2007 guaranteeing due repayment of the loan availed by 2nd respondent company. The appellants have resigned from their position of Director in the 2nd respondent company without getting any permission from the first respondent bank. The email sent to the bank is only an intimation and no permission was sought from the first respondent bank before resignation. Therefore, unilaterally resigning the position of Director in the second respondent company by the appellants will not exonerate them from repaying the loan liability to the bank in their capacity as Directors and as guarantors to the loan in their personal capacity.

11. Ld. Counsel further submitted that there was no new contract entered into between 2nd respondent and other Directors. Only the earlier loan facility was renewed with minor modifications in the rate of interest. The new loan agreement dated 25.10.2008, also refers about the sanction letter dated 25.07.2007 and other terms and conditions contained therein.

12. It is further submitted that despite giving sufficient opportunities to the appellants before the Tribunal below, the appellants have not produced any evidence in support of their case. The appellant, Mr.B.S.Raj Narain, D4 in the OA has transferred a sizeable portion of funds into his personal accounts from 2nd respondent company. After resignation from the post of Director, appellants started a new business and created many problems to the 2nd respondent company and other Directors. Therefore, considering all these aspects, Ld. Presiding Officer rightly allowed the OA and the Ld. Counsel for the first Respondent bank prayed for dismissal of these appeals.

13. In reply to this submission, the Ld. Counsel for the appellants submitted that there was no information to the appellants with regard to renewal of the loan facility. It is not necessary to seek permission from the first respondent bank for resigning from the post of Director. It is further submitted that conditions incorporated in the guarantee deed are against public policy. In support of his submissions, Ld. Counsel relied on the following judgments.

a) Hon’ble High Court of India, in re, Union Bank of India Vs. Rajan Malhotra and others reported in 2019 SCC Online 11177; AIR 2020 (NOC) 533 175: (2019);265 DLT 277(DB); (2019) 178 DRJ 424

b) Hon’ble High Court of Punjab & Haryana, in re, Punjab National Bank Vs/ Debts Recover Appellate Tribunal reported in MANU/PH/0455/2008.

c) DRAT, Chennai in re, Kailash Chandra Gaur Vs. Central Bank of India & Others reported in MANU/DC/0034/2005.

d) DRAT, Chennai, in re., V. Nanadkumar Vs. Central Bank of India reported in MANU/DC/0022/2005.

e) DRAT, Mumbai in re, Pratap Rama Rane Vs. Canara Bank and others reported in MANU/DM/0012/2007.

14. I have considered the rival submissions and perused the records.

15. There is no dispute with regard to sanction of Rs.25.00 lakhs to the 2ndrespondent company when the appellants (D4 and D5) were the Directors of the second respondent company. The only grievance is that they resigned from the post of Director by sending a letter on 22.2.2008 and 25.02.2008. Therefore, any contract entered into between the first respondent bank and 2nd respondent company and other Directors after their resignation will not bind them. On the basis of the revised sanction letter, especially when there are alterations in the terms and conditions, first respondent bank cannot force its claim against these appellants.

16. The sanction letter proceedings dated 25.07.2007 shows that Cash Credit limit was given to the 2nd respondent company to the tune of Rs.25 lakhs, when the appellants are Directors of the 2nd respondent company. There is a Covenant 'h', in the aforesaid sanction letter which states that "The firm/concern/company should not make any drastic changes in its management set up without the bank's permission'. This Covenant makes it clear that if there is any drastic change in the management set up of the 2nd respondent company, bank's permission should be obtained. Admittedly, in the case before hand, the appellants have not obtained bank's permission before their resignation from the position of Director from the 2nd respondent company. E-mail sent by the appellants on 22.02.2008 is just an information intimating about their resignation.

17. A perusal of renewal of Cash Credit facility reveals that earlier facility of Cash Credit limit of 25 lakhs was renewed with slight modifications in the interest rate. There is no other material variance in the terms of the contract. It is specifically stipulated that, "All other terms and conditions as per earlier sanction letter dated 25.07.2007 holds good". It is evident from this term that the renewal facility is in continuation of the earlier sanction proceedings dated 25.7.2007 and no new loan was sanctioned or any material change was made in the new loan renewal proceedings.

18. The Guarantee deed dated 27.07.2007, containing lot of Clauses, wherein the guarantors bound themselves for the repayment of loan amount. Some of the Clauses are extracted hereunder for understanding the implications of the Clauses on the guarantors.

"4. In the event of any default on the part of the Borrower in payment / repayment or 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 Loan Agreement, the Guarantor do hereby unconditionally and irrevocably undertake to pay the Bank forthwith on demand without protest or demur and without proof or condition shall, upon demand, forthwith pay to the Bank all the amounts payable by the Borrower under the Loan Agreement. The Guarantor shall pay interest at the rate of 13.5 % per annum ((applicable rate of interest to the advances made) on the amounts so demanded from them in the event of any delay in their making the payment to the Bank in terms of the notice of demand issued in this behalf by the Bank.

5. The Guarantor shall also indemnify and keep the Bank indemnified against all losses, damages, costs, claims and expenses whatsoever which the Bank may suffer, pay or incur by reason of or in connection with any such default on the part of the Borrower including legal proceedings taken against the Borrower and/or the Guarantor for recovery of the monies referred to in Clause 2 above.

6. The Guarantor hereby agree that without the concurrence of the Guarantor, the Borrower and the Bank shall be at liberty to vary, alter or modify the terms and conditions of the Loan Agreement and of the security documents executed by the Borrower in favour of the Bank and in particular to defer, postpone or revise the repayment of the Credit facility and/or payment of interest and other monies payable by the Borrower to the Bank on the such terms and conditions as may be considered necessary by the Bank including any increase in the rate of interest. The Bank shall also be at liberty to absolutely dispense with or release all or any of the security / securities furnished or required to be furnished by the Borrower to the Bank to secure the said Credit facility. The Guarantor agree that the liability under this Guarantee shall in no manner be affected by any such variations, alterations, modifications, waiver, dispensation with or release of security, and that no consent of the Guarantor is required for giving effect to any such variation, alteration, modification, waiver, dispensation with, or release of security.

10. The Guarantor hereby agree and declare that the Borrower will be free to avail of further loan or other facilities from the Bank or any other financial institution or Bank in addition to the Credit facility and or to secure the same during the subsistence of this Guarantee and in that event the Guarantee herein contained will not be affected or vitiated in any manner whatsoever but will remain in full force and effect and binding on the Guarantor.

11. The rights of the Bank against the Guarantor shall remain in full force and effect notwithstanding any arrangement which may be reached between the Bank and the other or others from liability and notwithstanding that any time hereafter the other Guarantor may cease for any reason whatsoever to be liable to the Bank, the Bank shall be at liberty to require the performance by the Guarantor of their obligations hereunder to the same extent in all respects as if the Guarantor had at all times been solely liable to perform the said obligations.

12. To give effect to this Guarantee, the Bank may act as though the Guarantor were the principal Borrower to the Bank.

16. This Guarantee shall not be wholly or partially satisfied, or exhausted by any

payments made to or settled with the Bank by the Borrower and shall be valid and binding on the Guarantor and operative until repayment in full of all monies due to the Bank under the Loan Agreement and the Bank issues a certificate in this regard.

19. This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Borrower repays in full the said Credit facility together with all interest, premium on prepayment or on redemption, costs, expenses and other monies that may from time to time become due and payable and remain unpaid to the Bank under the Loan Agreement.

20. The liability of the Guarantor hereunder shall be to the extent of Rs. 25,00,000/- plus all interest, premium on prepayment or on redemption, costs, expenses and other monies payable by the Borrower to the Bank under the Loan Agreement or any other letter or deed. Should there be any excess drawings of the said Credit facility by the Borrower over and above the initial limit sanctioned to the Borrower, for any reason whatsoever, the Guarantor shall be liable for the entire amount outstanding and the Guarantor expressly waive notice of such excess drawal".

19. As per these Clauses, especially, Clause No.6, the Guarantor agrees that bank shall be at liberty to vary, alter or modify the terms and conditions of the loan agreement and of the security documents executed by the Borrower, in favour of the bank ;As per Clause No.10,the Guarantor agrees that the borrower will be free to avail further loan and other facilities from the bank or any other financial institution or bank; As per Clause 12, to give effect to the guarantee, the bank may act as though the Guarantor were the principle Borrower to the Bank ;As per Clause No.19,the Guarantee shall be a continuing guarantee and will remain in confirmation, till the borrower repays in full the Credit facility, together with interest.

20. We have already found that in case of any change in the management set-up, the change should not be effected without the permission of the bank. Admittedly, neither the appellants nor the 2nd respondent company took permission from the first respondent bank for change in the management by way of resignation of appellants as Directors. The renewal loan arrangement is only in continuation of the earlier loan sanction proceedings. It is specifically recorded by Ld. Presiding Officer that the appellant/D4, Mr. B.S. Raj Narain had personally transferred a sizeable portion of funds to his personal account and he along with other appellant Mr. C. ARo Taffline (D5) after their resignation from 2nd respondent company started a new business creating so many problems to R2 company and other Directors. It is an admitted position that despite giving sufficient opportunities, appellants have not produced any oral or documentary evidence before the Tribunal below.

21. Coming to the judgments relied on by the Ld. Counsel for the appellants, he pressed into service the following judgments for the proposition that continuing

guarantee is not forever. Once guarantee is substituted with other guarantee, the creditor cannot seek to recover from the guarantor on the basis of earlier guarantee on the principle of novation. The relevant portion of judgments are extracted hereunder.

a) Hon'ble High Court of Delhi, in re, Rajan Malhotra and another Vs. Union Bank of India reported in 2019 SCC Online 11177; AIR 2020 (NOC) 533 175: (2019);265 DLT 277(DB); (2019) 178 DRJ 424.

" 27. This is a clear-cut case of novation of the earlier contract of loan. The novation contains two elements i.e. the discharge of the earlier debts or the debtors and substitution by new debts or the debtors. It is open to the parties to the earlier debt to either enter into new contract of debt or to substitute the debtors by new set of debtors. In the present case, the original loan contract comes to an end when the Petitioner No.1 and Respondent No.4 walked out of the Respondent No.3 company by resigning as its Directors with the consent of the Respondent No.1 Bank. A new set of Directors walked in who had not only re-casted the debt with the express consent of Bank but Respondent No. 1 also enhanced the limits on their asking. They also executed a new set of documents i.e. promissory note, the loan agreement and their personal guarantee bonds and the collateral security by mortgage of the property by Respondent No. 7. The substitution of a new contract is the core of novation and once a subsequent contract has been executed between the parties, net effect is that the earlier obligations stand discharged and it is the new contract that will define the relationship of the parties and it is a new cause of action which arises on execution of the new contract between the parties. The intention of the parties is very clear from the chain of events as mentioned hereinabove."

b) Hon'ble High Court of Punjab & Haryana, in re, Punjab National Bank Vs/ Debts Recover Appellate Tribunal reported in MANU/PH/0455/2008.

"10. From the above pleading of the parties, it is crystal clear that the bank has admitted that respondent No.2 had resigned from the Board of Director of respondent No.3 Company and another Director has executed a fresh guarantee substituting him. Thus, it does not lie in the mouth of the petitioner bank to say that respondent No.2 is not absolved of his liability even from the documents placed on record. The stand of the petitioner bank to the effect that the guarantee deed executed by respondent Nos. 4 and 5 on 13.5.2003 was additional guarantee, is falsified from fresh guarantee deed i.e. Annexure P-16, executed respondents 4 and 5, which shows that they had executed this guarantee deed for a sum of Rs.6,70,51,800.85 ps. The exact amount, which was outstanding of that day"

c) DRAT, Chennai in re, Kailash Chandra Gaur Vs. Central Bank of India & Others reported in MANU/DC/0034/2005.

"8.A continuing guarantee is a guarantee which extends to a series of transactions, as defined in Section 129 of the Indian Contract Act. But, however, a continuing guarantee can be revoked at any time but only in respect of the future transactions by notice to the creditor as postulated in Section 130 of the Contract Act. Nothing is immortal in this world. All creations are subjected to decay and destruction guarantee is also liable to revocation. As such, continuing guarantee does not mean that it is perpetual and would continue till one's life time or as long as the sun and moon exist. It is, therefore, clear that the continuing guarantee is not a perpetual one and the same is subject to revocation by the surety and the limitation is that would enure only in respect of future transactions and such revocation by a notice to the creditor.

11.The learned Advocate for the appellant further submitted that the appellant's resignation as a Director was accepted not only by the 1 st defendant company but also by the Bank and, they have all entered into a new contract of agreement from V. Nandakumar and thereby, there is a substitution in the place of the old contract, which by itself would act as novation of contract as per Section 62 of the Indian Contract Act and, therefore, the appellant is not liable. Appellant relied upon the case of The Indian Bank, Madras v. S. Krishnaswamy, AIR 1990 MS 115, in which it was observed in Para 12. "It is well settled that under Section 62 of the Contract Act, if the parties to a contract agree to substitute a new contract for it, or to rescind or after it, the original contract need not be performed." The observation in the case of Commercial Bank of Tasmania v. Jones, (1893) AC 313, was extracted, which states, "Novation of debt operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him."

13. The learned Advocate for the appellant has further argued that the respondent Bank failed to apply the Clayton's Rule i.e the 1st respondent Bank failed to put the appellant on notice that, with his resignation and revocation of guarantee, a ruling will be made regarding the liability which existed on the date of revocation of the guarantee. The Bank also did not reserve any right to adjust the future credits towards subsequent advances. That in the absence of any contract in the contrary, all subsequent credits would go to discharge the earlier debt, which existed prior to the date of revocation and if this doctrine had been adopted and followed, the appellant would not be found liable to any extent. In fact, the Bank has not established whether any liability existed even after applying the Clayton's Rule. There is nothing on record to show that the respondent Bank has applied the Clayton's Rule and, therefore, I hold that the appellant is not liable to pay any amount to the respondent Bank."

d) DRAT, Chennai, in re., V. Nanadkumar Vs. Central Bank of India reported in MANU/DC/0022/2005.

"7. I am fully convinced of the fact that the appellant who stood guarantee under Exhs. A-132 and A-133, is not a party to Exh. A-134, and when the parties to a contract had agreed to substitute a new contract for it or to rescind the same, then the original contract need not be performed and also derive support to say so from the case of the Indian Bank, Madras v. S. Krishnaswamy and Ors., , wherein it was held in para 12, "It is well settled that under Section 62 of the Contract Act, if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed." There is also an observation in the case of Commercial Bank of Tasmania v. Jones, 1893 AC 313 wherein it was observed, "Novation of debt operates as a complete release of the original debtor and cannot be construed as a mere covenant not to sue him." As such, I come to the conclusion that the appellant's liability came to be extinguished by the new contract and he is not liable to answer the claim of the Bank."

e) DRAT, Mumbai in re, Pratap Rama Rane Vs. Canara Bank and others reported in MANU/DM/0012/2007.

"12. The terms of the new agreement go to show that the parties had substituted the old contract by the new contract which attracts the provisions of Sec. 62 of the . Significantly the clause in the guarantee letter reserving right of the bank to make any variance in the contract with the borrower does not provide for the eventuality like substitution by a new contract as contemplated by Sec. 62 of the nor does the said clause refers to waiver of right under Sec. 62 of the . It means that the provisions of Sec. 62 of the would be very much applicable to this case. In this respect reference can be made to some of the judgments cited on behalf of the appellant.

14. In this case the provision of Sec. 62 of the would be applicable as there was substitution of the new contract between the parties and it would be unjust to hold the appellant liable because he was not the party to the new contract and he had also informed the bank about his retirement. It is obvious that because the appellant has retired or severed his connection with the company the appellant was not called upon to give fresh guarantee when the rehabilitation package was entered into between the parties and in place of four, five guarantees were taken and other collateral securities were accepted

22. It is seen from these judgments that the cases referred therein, there was a substitution of contract in the place of existing contract between the bank and the guarantor and when the guarantor was not a signatory to the substituted guarantee, then, the guarantor was held not liable.

23. In the case on hand, there is a specific stipulation with regard to change in management that change should not be effected without the permission of the bank. No new loan facility was also sanctioned, but only the existing loan facility was renewed with minor modification in the rate of interest. Even in the judgment of Hon'ble High Court of Delhi in re, Rajan Malhotra and another Vs. Union Bank of Indiareported in 2019 SCC Online Del.11177, it can be seen that change in management has taken place with the consent of the bank, therefore, it was held that resigned directors are not liable on the basis of the personal guarantee.

24. Therefore, these judgments are not applicable to the facts and circumstances

of the present case and appellants cannot take advantage of the proposition laid down in these judgments.

25. With regard to the submission of Ld. Counsel for appellants that appellants are discharged from the sureties by variance in terms of contract, as discussed above, this Tribunal finds no material variance in the terms and conditions and for variance in the interest rate also, there is express agreement given by the appellants for varying the terms of contract. Therefore, in terms of Section 133 of Indian Contract Act, the appellants cannot seek any discharge as contended by Ld. Counsel for appellants.

26. In the said circumstances and in view of the reasons stated above, this Tribunal finds that there is no need to take a different view than that was taken by Ld. Presiding Officer, DRT-II, Chennai and thus this Tribunal confirms the order of Ld. Presiding Officer passed in OA 237/2015 on 7.10.2015 and consequently these appeals are dismissed with the costs of first respondent bank.

27. In the result, Appeals RA 151/2017 and RA 152/2017 are dismissed, with the costs of first respondent bank.

28. Pending IAs, if any, stand closed.

