

(2001) 08 BOM CK 0026

In the Bombay High Court

Case No : Company Application No's. 557 and 634 of 2000 and Company
Petition No. 459 of 1989

B.R. Thadani

APPELLANT

Vs

Oriental Bank of Commerce

RESPONDENT

Date of Decision : 31-08-2001

Acts Referred:

Contract Act, 1872 — Section 128

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22

Citation : (2002) 2 BomCR 263

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : D.D. Madan, for the Appellant; Virag V. Tulzapurkar and S.H. Parikh,
for the Respondent

Judgement

R.J. Kochar, J.—The applicants have taken out the above company application praying for a direction to implead the applicant as party respondent to the company application No. 557 of 2000. In support of the Judges' summons, the applicant has filed an affidavit wherein it appears that the respondents have filed a claim application before the Debt Recovery Tribunal at Mumbai seeking to recover from the official liquidator and the applicants jointly and severally a sum of Rs. 8,20,76,369.27 with interest thereon. According to the first respondent, this was the amount due and payable by the company in liquidation to them. It appears that the official liquidator by his notice of admission of proof dated 14-8-2000 has allowed the applicants claim for the sum of Rs. 4,36,35,454 and since the first respondents having already received an amount of Rs. 3,62,91,150 out of the sale proceeds of the assets of Waterworks Engg. Ltd., a balance amount of Rs. 73,43,304 was payable to the applicant as per the aforesaid notice of admission. It appears that the first respondents have challenged the aforesaid adjudication of the official liquidator by filing the above company application No. 557 of 2000. It appears that the applicant was a guarantor vide the deed of guarantee dated 24-11-1987 and he is contesting the

claim before the DRT. The respondents have opposed the application. Shri Tulzapurkar, the learned counsel for the respondents has submitted that the applicant is neither a necessary nor a proper party to be impleaded in the above company application, as he is already contesting the claim before the debt recovery Tribunal. According to him, the company application is an appeal filed by the respondent No. 1, challenging the adjudication made by the official liquidator. The claim of the respondent No. 1 was against the company in liquidation and was adjudicated by the liquidator and an appeal against such an adjudication would lie only against the liquidator. According to the learned counsel, the applicant was neither the creditor nor a contributor to be vitally affected that as such the applicant to be impleaded as party in the company application. The proceedings were inter se between the respondent Nos. 1 and 2 and the applicant was not concerned with the adjudication made by the respondent No. 2 in respect of the claim of the respondent No. 1. It is further submitted that the cause of action of the respondent No. 1 against the applicant is totally different and is based on the guarantee given by the applicant and the cause of action against the company in liquidation is based on the securities given by the company in liquidation to the respondent No. 1.

2. Shri Madan, the learned counsel for the applicant herein, on the other hand, submitted that the applicant is vitally affected party as u/s 128 of the Indian Contract Act, the liability of the guarantor is coextensive with the principal debtor. According to him, whatever orders would be passed in the appeal against the adjudication orders of the liquidator, the applicant would be certainly affected. In case the appeal is allowed, the applicant's liability would also be increased. Under the orders of the liquidator, the liability of the applicant is reduced. Shri Tulzapurkar, however, has questioned the validity of the said submissions relying upon a judgment of this Court in the case of Bank of India Ltd. v. Rustom Fakirji Cowasjee AIR 1955 Bom. 419. According to him, the following observations in para 28 of the said judgment are relevant and the same are reproduced hereinbelow:

"That disposes of the whole of the points in the case. At the end of the hearing a further issue relating to interest was raised on behalf of the defendant. It was said that the plaintiffs are in any event not entitled to claim any interest on the amount of the claim after the date of the order of the Court for winding-up of the airline company. The argument was that since the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract and since the ordinary rule to be observed in liquidation proceedings is that there is to be no proof for interest subsequent to the order of winding up, the defendant is in any event not liable to pay interest for any period subsequent to the date of that order.

It was argued on behalf of the plaintiffs bank that the rule that interest would not run in such a case does not operate against the surety where the principal debtor is discharged from liability to pay interest by operation of law. Reliance was

placed on - Subramanian v. Batcha Rowther AIR 1942 Mad. 145 , where it was held that a discharge of the principal debtor by operation of law does not discharge the surety and the remedy of the creditor against the guarantor should not be restricted to the amount that the debtor may by operation of law be compellable to pay. The rule applicable to cases of this nature was very clearly enunciated in "Fitz George In re": Robson, Ex parte" 1905 1 KB 462 , where Bigham, J. Says. (p. 464)

I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore, the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion, the obligation of the debtor to pay interest under his guarantee remains." (p. 431)

3. In my opinion, the facts on which the claims are based and are being adjudicated, the applicant is certainly an affected party in the final decision of the matter. Under the adjudication order of the liquidator, according to the applicant, his liability is reduced and he stands benefited to that extent. If the respondents finally succeed in getting the said order of the liquidator set aside, it cannot be said that the applicant would not be adversely affected. In my opinion, it would not be proper to keep the applicants outside the company application, which challenges the order of the liquidator whereunder the applicant's liability is reduced. Finally, it may so emerge that the applicant's liability would stand as it is. However, the applicant should be given an opportunity to be heard in the matter wherein he is likely to be adversely affected if the order of the liquidator is set aside. I am, therefore, of the opinion that the applicant should be impleaded as a party respondent in the company application No. 557 of 2001. In the aforesaid circumstances, the Judge's summons is made absolute in terms of prayer clause (a) with no orders as to costs.