

(2001) 08 BOM CK 0038

In the Bombay High Court

Case No : Company Application No. 635 in Company Application No. 558 of 2000
in Company Petition No. 459 of 1989

B.R. Thadani

APPELLANT

Vs

Syndicate Bank and Others

RESPONDENT

Date of Decision : 03-08-2001

Acts Referred:

Contract Act, 1872 — Section 128

Citation : (2001) 107 CompCas 569

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

Bench : Single Bench

Advocate : D.D. Madan, instructed by Mulla and Mulla and Craigie, Blunt and Caroe, for the Appellant; Virag Tulzapurkar and S.H. Parekh, instructed by Kanga and Co., 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 partly respondent to company application No. 558 of 2000. In support of the Judge's 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. 11,89,56,606 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 August, 2000, has allowed the applicant's claim for the sum of Rs. 3,83,42,170 and since the first respondents having already received an amount of Rs. 4,23,88,850 out of the sale proceeds of the assets of Wester Works Engineering Limited - a balance amount of Rs. 40,46,680 is to be recovered from the first respondent-company 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. 558 of 2000. It appears that the applicant was a guarantor vide the deed of guarantee dated 24 November, 1987,

and he is contesting the claim before the Debt Recovery Tribunal. The respondents have opposed the application. Shri Tulzapurkar, 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 respondent No. 1, challenging the adjudication made by the Official Liquidator. The claim of 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 learned counsel, the applicant was neither the creditor nor a contributory to be vitally affected that as such, the applicant to be impleaded as party in the company application. The proceedings were inter se between respondents Nos. 1 and 2 and the applicant was not concerned with the adjudication made by respondent No. 2 in respect of the claim of respondent No. 1. It is further submitted that the cause of action of 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 respondent No. 1.

2. Shri Madan, learned counsel for the applicant herein, on the other hand, submitted that the applicant is a vitally affected party as u/s 128 of the Indian Contract Act, the liability of the guarantor is co-extensive 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 *The Bank of India, Ltd. Vs. Rustom Fakirji Cowasjee*, . According to him, the following observations in para. 28 of the said judgment are relevant and the same are reproduced hereinbelow :

"The 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 coextensive 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 plaintiff's 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 -- Al. Sp. S. Rm. Subramanian Chettiar Vs. Chinnamuthu Batcha Rowther and Another, , 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, be operation of law, be compellable to pay. The rule applicable to cases of this nature was very clearly enunciated in Fitzgeorge, In re : Robson, ex parte (1905) 1 KB 462 where Bigham J. says:

"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".

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 company application No. 558 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.

4. Amendments to be carried out within two weeks from today.

5. At the request of learned counsel for the respondent, this order is stayed for four weeks.