
(2009) 06 CAL CK 0002
In the Calcutta High Court

Case No : A.P.O. No. 416 of 2005 and C.P. No. 284 of 2004

Coventry Spring and Engineering Company Ltd.	APPELLANT
Vs	
I.C.I.C.I. Bank Ltd.	RESPONDENT

Date of Decision : 30-06-2009

Acts Referred:

Companies Act, 1956 — Section 434

Citation : (2009) 152 CompCas 68 : (2010) 1 CompLJ 66

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Biswanath Somadder, J

Bench : Division Bench

Advocate : Aniruddha Mitra, for the Appellant; Hirak Mitra, Soumen Sen and Krishnayan Sen, for the Respondent

Final Decision : Dismissed

Judgement

Surinder Singh Nijjar, C.J.—This appeal has been filed against the judgment and/or order passed by the Learned Single Judge dated February 11, 2005 whereby the winding up petition filed against the appellant company has been admitted for a sum of Rs. 3 crores together with interest at the rate of 5% p.a. from 1st April, 2003 until realization.

2. At the outset, we may notice here that the petitioning creditor here is a Financial Institution, namely, I.C.I.C.I. Bank Ltd. In the usual course of business, the petitioner granted financial assistance to Coventry Coil-O-Matic (Haryana) Ltd. (hereinafter referred to as the "Coil-O-Matic") on the request of Coventry Spring & Engineering Company Ltd. (hereinafter referred to as the "Coventry Spring"). Coil-O-Matic was granted a number of loans in foreign currency the details of which are set out in the petition.

3. During the negotiation and/or execution of the loan agreements, Coventry Spring represented that Coil-O-Matic is its alter ego. It was further represented that Coventry Spring being the promoter of Coil-O-Matic, it would be the obligation of Coventry Spring to ensure full repayment of all dues of the

petitioner and not to commit any breach which might jeopardize the securities against which the petitioner agreed to grant credit facilities. Apart from the share capital having been subscribed by members of the Bafna family, the management of both the companies was with them. It was, therefore, represented to the petitioners that Coventry Spring will be fully responsible for due repayment of all the dues. Coventry Spring is stated to be in control of Coil-O-Matic, the management being common. The loans advanced to Coil-O-Matic were duly guaranteed by its promoters. However, Coil-O-Matic did not adhere to the repayment schedule. Sometimes thereafter Coil-O-Matic was declared a sick company by the Board for Industrial & Financial Reconstruction (hereinafter referred to as the "BIFR").

4. In the proceedings before the BIFR, directions were issued granting concessional benefits to Coil-O-Matic. The repayment schedule was modified. However, in terms of the order passed by the BIFR, Coventry Spring executed corporate guarantee dated 13.8.2001 thereby guarantying due repayment of the loans taken by the Coil-O-Matic. The bank guarantee was an independent contract. It was also an irrecoverable and continuing guarantee. The guarantee contains a default clause by which Coventry Spring had committed that in the event of any default on the part of the Coil-O-Matic, Coventry Spring would be treated as the principle borrower and would repay the entire outstanding dues of the petitioner. The guarantee also contains an indemnity clause. The default clause and the indemnity clause are as under:

2. In the event of any default on the part of the Borrower in payment/repayment of any of the moneys 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 sanctioned scheme, the Guarantor shall, upon demand, forthwith pay to the Lender for itself and on behalf of the other Lender without demur all the amounts payable by the Borrower under the sanctioned scheme.

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

5. Clause 6 of the guarantee provides that the borrower and lender shall be at liberty to vary, alter or modify the terms and conditions of the sanctioned scheme. This clause also provides that the lender shall be at liberty to defer, postpone or revise the repayment of balance principle outstanding.

6. The petitioner performed all its obligations as per the order of the BIFR. Subsequently, however, BIFR by order dated October 4, 2001, de-registered Coil-O-Matic and directed that all the unfulfilled obligations under the approved package would continue to remain in force and shall be discharged by all

concerned accordingly. The statutory auditors of Coil-O-Matic also in their report dated August 30, 2001, had stated that Coil-O-Matic is not a sick industrial company as they find under Sick Industrial Companies (Special Provisions) Act, 1985.

7. The petitioner, therefore, claims that the Coil-O-Matic can no longer claim any shelter under BIFR and was obliged to discharge the obligations to the creditors as per the approved package. Coil-O-Matic, however, was unable to repay the loans even according to the modified schedule finalized by the BIFR. However, BIFR discharged company from the reference pending before it. Thereafter, the petitioner approached Coventry Spring for repayment of the amount due in terms of the obligations under the corporate guarantee dated 13th August, 2001.

8. Both Coil-O-Matic and Coventry Spring failed to pay off the dues of the petitioner. The petitioner, therefore, duly served statutory notice u/s 434 of the Companies Act, 1956 upon the registered Office of Coventry Spring. In the reply to the statutory notice it is stated that various financial facilities were provided to Coil-O-Matic with the pari passu charge with IDBI and IFCI. It is further stated that the memorandum of association of Coventry Spring do not permit the execution of a corporate guarantee and therefore, the guarantee is not binding upon Coventry Spring. In any event, since, the petitioner did not act in accordance with the directions issued by the BIFR, in that the default committed by Coil-O-Matic was not reported to BIFR. This would amount to variation of contract. Therefore, the petitioner has already discharged Coventry Spring as guarantors, under the Indian Contract Act.

9. Faced with this situation, the petitioners have moved the company court seeking winding up of the company. We may notice here that the petitioner has also filed a winding up petition against Coil-O-Matic before the Punjab & Haryana High Court which is still pending. A civil suit has also been filed against both the companies in this Court.

10. In the Affidavit-in-Opposition, Coventry Spring has even denied that Coil-O-Matic is its alter ego. No assurances or undertaking, wherever given by Coventry Spring to secure the loans in favour of Coil-O-Matic. In the alternative, it is submitted that the guarantee is null and void since the petitioner does not intend to proceed against the principle borrower, the company as guarantor has no liability to pay released dues of the petitioner. Since, no breach has been committed by Coventry Spring, the company petition is wholly misconceived. In any event, the petitioner having the civil suit on the same cause of action the company petition could not be maintainable.

11. On the basis of the aforesaid pleadings and after considering the submissions made by the Learned Counsel for the parties, the Learned Single Judge has held that "it is well settled principle of law that a contract of guarantee is an independent cause of action. Therefore, the plea that unless and until ICICI took steps for realization of the amount from the principle borrower, they were not

entitled to invoke the guarantee, is not tenable". It is also observed that in any event, during the pendency of the winding up petition, ICICI has also filed a petition for winding up against the principle borrower. With regard to the novation of contract, the submission is rejected being factually incorrect. It is observed that the agreement for repayment was entered into by and between the parties under the scheme in which Coventry Spring was a party.

12. The Learned Single Judge also notices that since Coil-O-Matic failed to repay the amount, a statutory notice of demand was served on Coventry Spring being the guarantor in the reply to the statutory notice the fact that the money was outstanding on account of Coil-O-Matic was not denied. Since, Coil-O-Matic have failed to repay ICICI invoked the contract of guarantee seeking repayment from the principle borrower.

13. The Learned Single Judge also rejects the submissions that the guarantee was meant to be a revolving guarantee to the effect that in case of failure to pay the instalments of Rs. 46 lacs each, ICICI would be entitled to invoke the guarantee. The contract of guarantee annexed to the winding up petition does not contain any such clause. In any event, the Learned Single Judge enquired from the Learned Counsel for Coventry Spring whether his client would be willing to pay Rs. 92 lacs covered by the two instalments. There was no effective reply to the query, the Learned Single Judge, therefore, holds that submission was made only to evade payment of the dues of ICICI. The contract having been signed by both the parties, was binding upon by both the parties, the revolving clause was a unilateral statement made in the resolution of the Coventry Spring and was not binding upon ICICI. In any event, since Coventry Spring was not willing to adhere even to the revolving clause, it would demonstrate their inability to pay.

14. With regard to the issue of the suit, the Learned Single Judge has opined that it was a suit with regard to the shares of the promoters in Coil-O-Matic as also for perpetual injunction from divesting the same. The suit had nothing to do with the recovery of money or the enforcement of guarantee. The Learned Single Judge has also examined balance sheet which would show that a sum of Rs. 3 crores is due and payable by Coil-O-Matic to ICICI as on 31st March, 2003.

15. With these observations, the Company petition has been admitted for Rs. 3 crores. We may notice here that alongwith the company petition, an application was also filed for appointment of a provisional liquidator. However, no order has been passed on the application for appointment of a provisional liquidator. This order has been challenged in this Letters Patent Appeal.

16. We have heard the Learned Counsel for the parties. We have also perused the entire pleadings. Learned Counsel for the appellant submits that the Learned Single Judge erred in law in holding that the company is a defaulter having already given time to the principle borrower for repayment. Once the petitioning creditor had agreed not to sue the principle borrower, the company stood

discharged from the obligations under the guarantee. The BIFR had provided for payment of money within specified period of time. Therefore, any extension of time without reference to the company would discharge the company of its alleged guarantee. It is further submitted that the Learned Single Judge erred in law by not applying the principles laid down in the various judgments cited before the Learned Single Judge.

17. On the other hand, Mr. Soumen Sen, Learned Counsel appearing for the petitioning creditor submits that bare perusal of the opening paragraph of the impugned judgment will show that the appellants have filed a wholly frivolous appeal. The Learned Single Judge had kept the matter pending even after the arguments had been concluded to enable either the borrower company or the guarantor to fix a further repayment schedule. It is only when both the companies failed to provide a repayment schedule that the judgment was pronounced by the company court. The Learned Counsel also pointed out that the company is now taking all sorts of technical defences which are against the record.

18. The Learned Counsel submits that Coventry Spring is merely trying to delay the discharge of its obligations under the guarantee. The execution of the guarantee was admitted. He further submits that the balance sheet as on 31st March, 2003 shows an outstanding of Rs. 3 crores in favour of the petitioning creditor. Coventry Spring was responsible to repay the loan since Coil-O-Matic has failed to repay the loan. It was an obligation of Coventry Spring to repay the same as guarantor. Since the repayment was not done, I.C.I.C.I. Bank was entitled to invoke the contract of guarantee being an independent cause of action.

19. We have considered the submission of the Learned Counsel for the parties. We have also perused the entire paper-book. A perusal of the documents and pleadings clearly shows that the financial assistance was given by ICICI to Coil-O-Matic at the instance and persuasion of Coventry Spring. In order to ensure that Coil-O-Matic succeeds, Coventry Spring even gave an undertaking that it will purchase all its requirements of cold coiled springs from Coventry Spring. They also undertook to divert all the purchase orders received by them for cold coiled springs to Coventry Spring at the prevailing market rate or at cost plus 15% margin basis, whichever is more. A number of other undertakings were also given by Coventry Spring so that financial assistance could be extended to Coil-O-Matic. In spite of the finance being made available, Coil-O-Matic apparently did not succeed. Consequently, it went before the BIFR. Certain directions were issued by the BIFR for restructuring Coil-O-Matic.

20. Sometimes thereafter, BIFR de-registered Coil-O-Matic as a sick unit. Even after repeated demands made by ICICI, Coil-O-Matic failed to repay the loan amount. Thereafter, requests were made to Coventry Spring by ICICI for repayment. Since both the companies have failed to make the payment, statutory notice was duly served upon the registered office of Coventry Spring. In its reply to the statutory notice, Coventry Spring does not deny the liability of

Coil-O-Matic. It raises certain defences claiming to be discharged from the bank guarantee.

21. Upon consideration of the entire situation, the Learned Single Judge rejected the submissions of the Learned Counsel for the appellant, Coventry Spring based on the discharge from the bank guarantee. With regard to the civil suit, the Learned Single Judge observed that the suit had no bearing on the subject matter of the winding up petition. The submissions with regard to the novation/variation of the contract were rejected. It was also observed by the Learned Single Judge that Coventry Spring was a party to the reschedule payments ordered by the BIFR in the schemes sanctioned for its restructuring. In fact, the corporate guarantee was executed before the BIFR. The company was clearly bound by the same.

22. We see no reason to take a different view. Even before us it is not disputed that Rs. 3 crores is shown to be due and payable by Coil-O-Matic to ICICI in the balance sheet as on 31st March, 2003.

23. We may also notice at this stage that the Learned Single Judge, after hearing of the petition had concluded kept the matter pending to enable Coventry Spring to come up with repayment schedule. In the opening paragraph of the impugned judgment the Learned Single Judge has observed as follows:

Hearing of the winding up petition was concluded on January 11, 2005. The matter was kept pending to enable Mr. Saha to come with repayment schedule so that this Court could examine the feasibility of fixing the further repayment schedule either by the borrower company or by the guarantor. Mr. Saha was to inform this Court by way of mentioning. Considerable time has passed he has not done so. Hence, I do not wish to keep this judgment pending any further and proceed to deliver the same today.

24. In spite of the aforesaid leniency shown by the Learned Single Judge, the Coventry Spring has failed to discharge its obligations under the bank guarantee.

25. In view of the above, we are of the considered opinion that the present appeal is wholly bereft of any merit. We see no reason to interfere with the order passed by the Learned Single Judge.

26. Thus, the appeal is dismissed.

Biswanath Somadder, J.

27. I agree.