

(2018) 08 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No.1448 Of 2016

Dena Bank

APPELLANT

Vs

Dawood And Co.And 2 Ors.

RESPONDENT

Date of Decision : 31-08-2018

Acts Referred:

Indian Contract Act, 1872 — Section 133
Constitution of India, 1950 — Article 226

Citation : (2018) 08 BOM CK 0136

Hon'ble Judges : K.K.TATED, J;SANDEEP K. SHINDE, J

Bench : Division Bench

Advocate : Pranav Desai, K.D.Shukla, Girish Thanvi

Final Decision : Dismissed

Judgement

Shri Sandeep K. Shinde, J

1 The Debts Recovery Appellate Tribunal at Mumbai by judgment dated 27.10.2015 dismissed the appeal preferred by the Petitioner Bank against

the order dated 13.1.2015 passed by the learned Presiding Officer, DRT II, Mumbai in Original Application No.1164 of 2000. The said order dated

27.10.2015 is impugned herein by the Bank. 2 The Petitioner Bank sued guarantors respondents, in its original application for recovery of

Rs.67,17,573/- with interest @ 12.5% p.a. from the date of filing of the application till its realization.

3 The case discernible from the pleadings of the parties is as under:

Samta Charmodhyog Co-operative Society Ltd. (for short the 'Society') manufactures of hand-made leather footwear and leather articles of

which the Respondent No.1, a partnership firm, was exclusive purchaser. The Respondent Nos.2 and 3 are the partners of the Respondent No.1.

At the request of the Society in March, 1995, the Petitioner Bank had agreed to sanction the loan to 400 members of the society in terms;

Rs.25,000/ each aggregating to Rs.1 Crore. Agreement to guarantee was executed on 15.3.1995 between the society, Respondent Nos.1 to 3 on

one hand as guarantors and the Dena Bank on the other hand. Vide this agreement of guarantee, the Petitioner Bank had agreed to sanction and

release Rs.25,000/ to each of the members (Cobblers) of the Society to enable them to purchase raw material, tools, equipments from the said

Society and produce goods and all kinds of footwear. Petitioner Bank had agreed at the request of the guarantors to sanction loan in aggregate

not exceeding Rs.1 Crore. It was continuing security and respondents Guarantors, were to be held jointly liable with the borrowers in case of default

in repayment of the loan disbursed to the members of the society. Under the said guarantee, the Respondents and the Society being guarantors

expressly agreed that the Petitioner Bank shall also have powers to vary the terms and conditions of the loan and/or agreement of guarantee. The

said agreement of guarantee in its schedule refers to the list of 400 borrowers; however, no names and/or particulars were stated in schedule.

4 On 18.3.1995, another agreement was executed between the said Society and the Petitioner Bank whereunder, at the request of the Society,

former agreed to open current account in the name of the Society and disbursed the entire loan amount to the Society directly. The Respondents

herein were not party to the subsequent agreement dated 18.3.1995. It is not in dispute that the Petitioner Bank credited the loan amount to the

account of Society directly, in stead of, disbursing it to individual member, as agreed under agreement dated 15.3.1995.

5 That on default by the members in repaying loan, the Bank after issuing notice, filed summary suit in the High Court which came to be transferred to

the Debts Recovery Tribunal ('DRT' for Short) being Original Application No.1164 of 2000.

6 The Presiding Officer of DRT II, Mumbai was pleased to dismiss the Original Application having found the claim was premature and also on

such other grounds, by judgment dated 13.1.2005. This was carried in Appeal before the DRAT, Mumbai. The learned Chairperson vide judgment

dated 27.10.2005 dismissed it, against which the present Writ Petition is

preferred.

7 Heard the learned counsel appearing for the respective parties. Perused the pleadings and the material placed on record.

8 It is not in dispute that against guarantee dated 15.3.1995 executed by the Society and the Respondents herein, as guarantors, Bank had agreed to

disburse the loan to 400 members of the said Society. The guarantee agreement dated 15.3.1995 refers to the list of names of borrowers in

schedule; however, admittedly, a list was not a part of the agreement. The schedule only refers to a loan of Rs.25,000 to each member,

aggregating Rs.1 Crore. Neither names of borrowers were mentioned in the guarantee agreement nor such other particulars were given.

Resultantly, those 400 borrowers' members remained unidentified throughout.

9 Yet another agreement dated 18.3.1995 was executed by and between the said society and the bank. Admittedly, the Respondents herein were not

party to the said agreement dated 18.3.1995 (hereinafter referred to as 'Subsequent Agreement'). Under the subsequent agreement, earlier

arrangement of disbursing the loan to each of the members of the society has completely undergone the change. Under the subsequent agreement,

the bank had agreed to grant loan of Rs.1 Crore to the society. Thus, subsequent agreement in fact for all purposes substituted the first agreement

dated 15.3.1995. Under the first agreement, loan was to be granted and disbursed to individual members to which the present respondents and

the society stood guarantors; however in terms of the subsequent agreement, loan was granted and disbursed to the society alone. Admittedly, the

Respondents herein were not party to the subsequent agreement dated 18.3.1995. Indisputedly, the subsequent agreement was acted upon and the

loan amount was credited to the account of the society.

On the backdrop of the aforesaid facts, the contention of the learned counsel for the petitioner that subsequent agreement dated 18.3.1995 has only

varied the terms of the first agreement and, therefore, even though the Respondents were not party to the subsequent agreement, terms and conditions

of it were enforceable against the present Respondents is required to be tested and answered.

10 It is not in dispute that the loan was disbursed in terms of the subsequent

agreement, to which the Respondents herein were not party. So as to test arguments of the Petitioner, we have gone through the subsequent agreement. It does not even make reference to the first agreement dated 15.3.1995. That vide guarantee agreement dated 15.3.1995, Respondents and the Society were guarantors to Bank, for a loan, which bank had agreed to sanction and disburse to 400 individual members. However, evidence has disclosed a fact that Bank had sanctioned & disbursed the loan to the Society alone and not to 400 members of Society, as had agreed under guarantee agreement dated 15.3.1995. In the given set of facts indisputably, loan was sanctioned and disbursed to the Society in accordance with the subsequent agreement dated 18.3.1995 to which respondents were not party. In fact, the subsequent agreement is an independent document and we do not find any traces of first guarantee agreement therein. Under the subsequent agreement, Society is borrower, who was eventually guarantors under agreement dated 15.3.1995. Thus, subsequent agreement was independent to deed of guarantee dated 15.3.1995 in form and substance. In the given circumstances, the contention of Petitioner that the subsequent agreement is not a new agreement but would vary certain terms and conditions of the guarantee agreement and, thus binding and enforceable against the Respondents is not accepted and hence, dismissed. 11 It may also be stated that the bank in their affidavit in lieu of evidence in paragraph 8 had relied on subsequent agreement dated 18.3.1995. In paragraph 8, the Bank has stated "In further consideration of the Applicants granting the loan of Rs.100 lakh to 400 members of the Society, by a Deed of Guarantee dated March 18, 1995 the Society and Defendants jointly and severally and irrecoverably guaranteed to the Applicants two days after demand in writing without demur or protest all the amounts due and payable to the Applicants by the member borrowers of Society together with interest, banking and other charges and expenses that the Applicants may charge to the said borrowers. Hereto annexed and marked 'Exhibit G' is a copy of the said Deed of Guarantee."

Thus, claim of the bank in the aforesaid paragraph is incorrect. The Respondents herein were not party to the subsequent agreement and, therefore, pleading and the evidence sought to be pressed into service, in terms, that "By deed of guarantee dated March 18, 1995, society and the defendants

jointly, severally and irrecoverably guaranteed to the applicants..... to the said borrowersâ?? is wholly incorrect.

12 The learned DRAT has correctly recorded the findings that the Bank has deviated from the original agreement and inÂstead of sanctioning and

disbursingÂ loan to 400 cobblers, the Bank has disbursed the loan to the society as per the subsequent agreement. We do not see any reason to

interfere with this finding recorded by the Appellate Tribunal.

13 Petitioner's counsel has made faint attempt to rely to provisions of Section 133 of the Indian Contract Act, 1872. It reads as under:

â??133. Discharge of surety by variance in terms of contractÂ Any variance made without the surety's consent, in the terms of the contract between

the principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.â??

Considering the facts of the case, we are unable to understand as to how provisions of Section 133 of the Act, would help Petitioner. No doubt,

guarantee agreement refers to provisions of Section 133 of the Indian Contract Act, 1872 but since we have concluded that subsequent agreement is

independent of guarantee agreement dated 15.3.1995, in form and substance, we reject this contention of the Petitioner.

That even otherwise, the DRTÂ at first instance correctly held that, guarantee cannot be enforced against the respondents when borrowermembers

remained unidentified throughÂout.

14 The Petitioner has not pointed out or brought to our notice any perversity in the judgment of the Appellate Tribunal. That for the reasons stated

hereinabove, we are not inclined to interfere with the order impugned in the writ jurisdiction of this Court under Article 226 of the Constitution of India.

15 In the result, PetitionÂ is dismissed.Â 16 No order as to costs.