

(1998) 07 BOM CK 0086
In the Bombay High Court
Case No : Civil Suit No. 1 of 1990

Deutsche Bank

APPELLANT

Vs

Shri S.P. Kala and another

RESPONDENT

Date of Decision : 03-07-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1
Companies Act, 1956 — Section 125, 132, 434, 529

Citation : AIR 1999 Bom 1 : (1998) 4 BomCR 235 : (1999) 98 CompCas 841

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : R.V. Dani, S.P. Kumar, S.S. Usgaonkar, for the Appellant;

Judgement

R.K. Batta, J.—The plaintiff- Bank had, in or about November, 1983, on the request made by the second defendant, in his then capacity as sole proprietor of the firm "Sea Transportation Enterprises Private Limited" sanctioned several credit facilities including overdraft facility. Subsequently, the said firm was incorporated as company and in pursuance of a resolution passed by the Board of Directors of the Company on 5th January, 1984, all the liabilities of the said proprietary firm were taken over by the said company. On the request of the second defendant, therefore, the plaintiff transferred to the name of the company the credit facilities which were then enjoyed by the said firm together with the debit balances of the said firm. By an agreement of hypothecation dated 21st September, 1984 the said Company created first charge of all their products, moveable property and goods as well as their book debts, monies, receivables, claims etc. as security for payment of all amounts due and payable by the company to the plaintiff under any facility or account whatsoever. The second defendant in his personal and individual capacity, by letter of guarantee dated 21st September, 1984, guaranteed payment of all amounts due and payable by the company to the plaintiff in respect of all the present or future advances and liabilities upto a limit of the principal sum of Rs. 12 lakhs and also interest thereon as mentioned in the guarantee.

2. In or about April, 1987 pursuant to the request made by the Company to the plaintiff and the second defendant, the plaintiff agreed to grant the overdraft facility upto a limit of Rs. 16 lakhs and for the said purpose the company executed promissory note dated 23rd April, 1987 promising to pay to the plaintiff on demand the said sum of Rs 16 Lakhs with interest thereon at the rate of 7.5. % per annum over the Reserve Bank of India rate and with a minimum of 17.5% per annum and also executed a deed of hypothecation of book debts dated 23rd April, 1987 thereby hypothecating by way of first charge in favour of the plaintiff of the present and future book debts, outstandings, monies, receivable, claims, bills, encashment ,etc. as security for repayment of the plaintiff's dues under the said facility. The amounts under the overdraft facility were repayable together with interest and all costs, charges and expenses by 30th December, 1987. The interest payable was 17 1/2% per annum with quarterly rests and in case of default, additional interest of 2% was payable.

3. The company, by undated letter which was received by the plaintiff on or about 6th January, 1988, admitted and acknowledged their liability to the plaintiff under the said facility and while confirming their commitment to bring the outstanding liability down to Rs. 10 lakhs by 31st December, 1987, sought extension of time till 29th February, 1988. The Company was unable to honour the said commitment and the company was asked to pay all the outstanding dues with interest by letter dated 16th November, 1988. The plaintiff also invoked personal guarantee dated 21st September, 1984 and demanded from the second defendant all dues with interest. The company as well as defendant No. 2 failed to pay the amount due. In the meantime, liquidation proceedings had started against the said company u/s 434 of the Companies Act for winding up. Accordingly, the plaintiff sought permission of this Court to file civil suit for the recovery of the said amount and this Court, vide order dated 25th January, 1990 granted permission to the plaintiff Bank to file suit before this Court. This order, was in fact, challenged by the plaintiff Bank to the limited extent that permission should be granted to file the suit in Bombay, but by order dated 11th January, 1991 the said request was turned down by the Division Bench of this Court in Company Appeal filed against the judgment of the learned Single Judge who had granted leave to the plaintiff Bank to file the suit against the said company under liquidation proceedings, defendant No. 1 was appointed as liquidator of the company.

4. The plaintiff thus filed a suit for the recovery of a sum of Rs. 22, 41, 426.02 with further interest of Rs. 11, 66, 178. 74 at the rate of 18.5% per annum from the date of the filing of the suit till realisation.

5. The plaintiff's claim that there is valid and subsisting hypothecation in the nature of first charge of the Bank on the company's goods and book debts as specified in the deed of hypothecation dated 21 September, 1984 and 23rd April, 1987 and that the same should be sold and the sale proceeds realised thereof be paid to the plaintiff. The prayers in the plaint are that the defendants jointly and

severally be ordered and decreed to pay to the plaintiff the said sum of Rs. 22, 41, 426.02 with further interest of Rs. 11, 66, 178. 74 at the rate of 18.5% per annum from the date of filing of the suit till realisation and that the goods and book debts specified in the deeds of hypothecation (Exhs. B and D2) be sold and the net sale proceeds be paid to the plaintiff towards satisfaction of their claim. The defendant No. 2 was duly served for settlement of issues, but he did not appear. Defendant No, 1 filed his reply.

The said issues are:-

- 1) Does the plaintiff prove that it granted overdraft facility of Rs. 16 lakhs to Sea Transportation Enterprises Pvt. Ltd. (for short, the company)?
- 2) Does plaintiff prove that the company executed a hypothecation deed dated September 21, 1984 in favour of plaintiff?
- 3) Does plaintiff prove that defendant No. 2 executed a guarantee dated September 21, 1984 in favour of plaintiff?
- 4) Does plaintiff prove that the company executed a hypothecation of book debts dated April 23, 1987 in favour of plaintiff ?
- 5) Does plaintiff prove that the company executed a promissory note dated April 23, 1987 in favour of plaintiff for Rs. 16 lakhs with interest?
- 6) Does plaintiff prove that defendants are liable jointly and severally to pay a sum of Rs. 22, 41, 426. 02 and interest @ 18.5% from the date of filing of the suit until payment ?

6. The stand taken by defendant No. 1 is that by deed of hypothecation dated 29.8.84 executed between the Bank and the company a security was created of Rs. 15.50 lakhs in favour of the plaintiff Bank which was registered with the Registrar in terms of the provisions of section 125 and 132 of the Companies Act. In respect of the same, the plaintiff Bank is a secured creditor against defendant No. 1, that is official liquidator to the extent of Rs. 15-50 lakhs. In respect of the overdraft facility to the tune of Rs. 16 lakhs the hypothecation agreement dated 23-4-87 was not registered as the same was filed with the delay of 12 days. The Registrar of Companies informed the plaintiff Bank to move Company Law Board and seek condonation and the Bank was informed that if charge is not registered after getting condonation of delay, charge will be void and unsecured. The plaintiff Bank did not take any steps in that direction and , as such, the stand taken by the official liquidator-defendant No. 1 under proviso 1 of section 125 of the Companies Act is that the charge for Rs. 16 lakhs is unsecured and void against defendant No. 1. In the said reply it was also pointed out by the official liquidator that the company had opted to remain outside liquidation proceedings and did not consent to their securities being sold by the official liquidator along with other assets of the company, as a result of which the stand taken by the official liquidator is that it is open to the company to realise the book debts and appropriate them against their security under the applicable laws for which the

official liquidator has no objection if the plaintiff Bank realised book debts of their own as proposed in their letter dated 7-4-87. On merits, it was stated by the official liquidator that he is not in a position to pay a single penny to the plaintiff Bank since the ex-Directors of the company had not handed over any property of the company to the official liquidator inspite of the ex-Directors having been prosecuted for non-filing of Statement of Affairs in the office of the official liquidator as ordered on 14- 12-90 by which fine of Rs. 200/- each on the Directors was imposed. The defendant No. 2 has not taken any steps to furnish the statement of affairs. Secondly, it was pointed out that the plaintiff-Bank had opted to remain outside liquidation proceedings and realise the book debts and appropriate them for the amount for which they are secured creditors against the official liquidators. It was also pointed out that the plaintiff Bank can realise the total loan amount from the defendant No. 2 who is guarantor in this case. But in case of book debts, they should be allowed to realise the amount to the extent for which they are secured creditors.

7. Draft issues were filed by advocate for the plaintiff on 20-11-92 which have been treated as issues in the suit. By order dated 14th February, 1997, the plaintiff Bank was permitted to file affidavit under Order 19, Rule 1 C.P.C. in order to prove the facts in issue. Detailed affidavit dated 30th June, 1997 was accordingly filed and by the said affidavit the averments made in the plaint were confirmed. In the said affidavit it was stated that the overdraft facility upto an amount of Rs. 16 lakhs was duly registered under Companies Act, 1956 which fact was contrary to the reply which was filed by the official liquidator as back as 13th June, 1991. When the advocate for the plaintiff was questioned in respect of the registration of the said overdraft facility upto the amount of Rs. 16 lakhs, he sought to file affidavit of the Assistant Manager, K. Balakrishna on the issue. This affidavit was filed on 5th August, 1997 in which it was stated that the deponent K. Balakrishna, Assistant Manager of plaintiff Bank had inadvertently stated that the charges were registered as the Bank all along had proceeded on the footing that the charges were registered though it appears that the company did not register the same. K. Balakrishna, Assistant Manager, tendered unconditional and unqualified apology for the mis-statement in the earlier affidavit which, according to him, was due to inadvertence. Taking into consideration that as back as 13th June, 1991 the official liquidator/defendant No. 1 in his reply had stated that the said charge for Rs. 16 lakhs was not registered and was thus unsecured and void against defendant No. 1, the Assistant Manager, K. Balakrishna of the plaintiff Bank still chose to file affidavit on 30th June, 1997 that the said overdraft facility to the extent of Rs. 16 lakhs had been registered under the provisions of the Companies Act, 1956. In fact, according to the official liquidator, the plaintiff Bank was informed that it should move the Company Law Board for seeking condonation of delay in filing hypothecation agreement dated 23-4-87 and also that if the charge is not registered after getting condonation of delay, charge will be void and unsecure. In view of this statement, I find it difficult to accept the submission made by K. Balakrishna, Assistant Manager of the plaintiff Bank that

the statement relating to registration of charge in relation to Rs. 16 lakhs was inadvertently made. Inadvertence is a mere excuse to cover up the lack of diligence on the part of K. Balakrishna, Assistant Manager of the plaintiff Bank. Thus, K. Balakrishna, Asst. Manager of the ?plaintiff Bank has not only acted with lack of diligence, but has been very casual in his approach in making the said statement on affidavit, which is contrary to the records. In fact, he could be prosecuted for filing false affidavit. In view of the fact that he has tendered unconditional and unqualified apology, I do not propose to precipitate the matter further, but I am of the firm opinion that it is necessary that the plaintiff Bank should make necessary endorsement in the confidential dossier of K. Balakrishna that he had not acted diligently in filing the affidavit before this Court. The plaintiff/Bank shall therefore make such entry in the confidential dossier of K. Balakrishna.

8. Learned advocate Shri S.S. Usgaonkar was heard on behalf of the plaintiff and he brought to my attention the documents on record which have been proved through the evidence of K. Balakrishna, Assistant Manager, who filed affidavit in the matter. The official liquidator relied upon averments made in the reply dated 13th June, 1991 and 21st July, 1997.

9. Bb that as it may, I shall now proceed to deal with the matter. Insofar as the suit against defendant No. 2, on the strength of personal guarantee in his individual capacity is concerned, the plaintiff has been able to establish through affidavit evidence of K. Balakrishna, Assistant Manager of plaintiff Bank that such guarantee had been given by defendant No. 2 vide fetter of guarantee dated 21 September, 1984 to a limit of principal sum of Rs. 12 lakhs and also interest thereon. The defendant No. 2 would thus be liable under the said guarantee upto the limit specified thereunder.

10. In relation to security for Rs. 15.50 lakhs, which is registered with the Registrar of Companies, the plaintiff Bank is secured creditor against the official liquidator to that extent. Insofar as the charge over book debts to the tune of Rs. 16 lakhs is concerned, the same is not registered with the Registrar of Companies and in terms of section 125 of the Companies Act the charge on the said amount of Rs. 16 lakhs is insecure and void against official liquidator-defendant No. 1. In this respect, I would also like to point out that the overdraft facility of Rs. 16 lakhs was granted to the company on certain conditions which are found in letter dated 29th April, 1987 which is at page 190 of the suit and the said conditions are:-

"Security: 1) Assignment of Receivables from the undermentioned companies (debtors), by executing a hypothecation agreement on a Rs. 40/- Stamp paper, supported by a Board Resolution of the company:

2) Letter from the above mentioned debtors that:

a) They confirm in writing the indebtedness to you stating the exact amount and the relevant order executed by you.

b) Also they shall confirm in the same letter that all payments to you would be made to the credit of your account No. 70/1049 with Deutsche Bank (Asia) AG, Bombay Branch, Tulsiani Chambers, Nariman Point, Bombay 400 021.

You agree, to repay to the Bank the said overdraft together with interest, costs, charges and expenses on or before the 30th December, 1987.

You shall pay interest to the Bank at the rate of 17.5% p.a. with quarterly rests and if in case of default in payment of the said overdraft the Bank shall be entitled to charge, (without prejudice to Bank's other rights arising due to the default as mentioned herein), and you shall be liable to pay additional interest at the rate of 2% (over and above the aforesaid interest rate of 17.5% p.a.) from the date of default till payment of realisation."

These conditions were duly accepted by the company. When a query was raised as to whether any action was taken by the plaintiff Bank, in relation to condition No. 2 above, it was disclosed in further affidavit by K. Balakrishna, Assistant Manager of the plaintiff Bank, that no such letter was received by the plaintiff Bank from debtors either directly or through the defendants. The credit facility of Rs. 16 lakhs was given on assignment of receivable amounts from various parties in respect of which further action was required to be taken by the company but the Bank officials had been totally negligent in not obtaining such letters as specified in the condition and that for this negligence of the Bank officials the security cannot materialise. For this negligence, due to which the plaintiff Bank in fact has suffered loss, it is necessary for the plaintiff Bank should take appropriate action against the officials responsible for the same. It is also considered necessary that the Reserve Bank of India, Bombay be intimated for taking appropriate action in the matter. Thus, insofar as the recoveries sought by the plaintiff on the strength of the overdraft facility to the tune of Rs. 16 lakhs is concerned, the same having not been registered with the Registrar of Companies, the said charge is void by virtue of Proviso 1 of section 125 of the Companies Act against the official liquidator and no relief can be granted in respect of the same against the official liquidator.

11. In respect of security for Rs. 15.50 lakhs, the Bank has opted to remain outside liquidation proceedings and the Bank is permitted to realise the book debts to the extent for which the plaintiff is secured creditor. This, of course, would be subject to preferential payments u/s 529-A and section 536 of the Companies Act.

12. In view of the affidavit evidence on record, the plaintiff has been able to establish issues No. 1 to 5 which are answered in the affirmative. The plaintiff has also been able to establish that a sum of Rs. 22, 41, 426.02 with further interest of Rs. 11, 66, 178.74 at the rate of 18.5% p.a. is due from the company and defendant No. 2.

13. In respect of Issue No. 6 it has been stated by the official liquidator that factually the assets of the company have not so far been handed over in the

liquidation proceedings due to which the official liquidator would not be in a position to pay any amount to the plaintiff Bank. However, taking into consideration that the credit facility upto the tune of Rs. 16 lakhs has not been registered with the Registrar of Companies, the charge of the plaintiff-Bank in respect of the same is insecure and void against defendant No. 1 official liquidator for which official liquidator cannot be held liable to pay the said amount. In respect of the charge relating to Rs. 15.50 lakhs, the plaintiff Bank is a secured creditor, but has opted to remain out of the liquidation proceedings and, as such, in this respect also no relief can be granted against the official liquidator. The plaintiff Bank is permitted and is at liberty to enforce and realise goods and book debts to the extent of Rs. 15.50 lakhs. The plaintiff Bank is entitled to revoke the personal guarantee given by the defendant No. 2 by letter of guarantee dated 21st September, 1984 upto a limit of the sum of Rs. 12 lakhs and interest thereon as mentioned in the guarantee.

issues No. 6 stands answered in the aforesaid terms

14. The suit therefore stands decreed in the aforesaid terms with no order as to costs. The plaintiff Bank is expected to take necessary disciplinary action against the Bank officials who failed to secure letters from the company as stated in condition No. 2 by letter dated 29th April, 1987 which is at page 190 of the suit on the strength of which, the overdraft facility had been granted, taking assignment of receivables from various companies as security. The Bank shall also make necessary entry in the confidential dossier of K. Balakrishna, Assistant Manager of the plaintiff Bank, as stated in the earlier part of this judgment. A copy of judgment shall be forwarded to the Reserve Bank of India, Bombay for taking necessary action deemed fit in the matter.

15. Suit decreed partly.