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In the Delhi High Court

Case No : C.S. (O.S.) No. 1220 of 1996

Himachal Pradesh State Co-Operative Bank Ltd. APPELLANT

Vs

M/s. Madan Lal Ajay Kumar and Others RESPONDENT

Date of Decision : 14-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 133

Citation : (2013) 5 AD 174

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Sumant De, Mr. A.K. Mehta and Mr. Prateek Kohli, for the Appellant; Adarsh Dial, with Mr. Pushkar Sood, for D-9 to 13, for the Respondent

Judgement

M.L. Mehta, J.—The plaintiff has filed this suit for recovery of Rs. 2,07,20,177.85 (Rupees Two Crore Seven Lakhs Twenty Thousand One Hundred Seventy Seven and Paise Eighty Five) with interest calculated till April 30, 1996 and further pendent lite and future interest at the rate of 24% per annum. The facts leading to this suit are as follows:

The plaintiff is a co-operative bank registered under the Himachal Pradesh Co-Operative Societies Act, 1968. The plaintiff has its registered office in Himachal Pradesh and one of its branches is situated in Delhi. This suit pertains to the said branch at Delhi situated at 10, New Sabzi Mandi, Azad Pur, New Delhi - 110033. The plaintiff submits that defendant no. 1 is a partnership firm duly registered under the Partnership Act and engaged in the business of Commission Agent under the name and style of M/s. Madan Lal Ajay Kumar and defendant nos. 2 to 5 are stated to be its partners. That the defendant no. 6 is a partnership concern consisting of two partners namely Sh. Naresh Kumar Suri, Sh. Deepak Suri i.e. defendant nos. 7 and 8; running their business under the name and style of M/s. National Fruit Agency. The plaintiff submits that defendant no. 9 is also a partnership concern consisting of 4 partners namely Sh. Bal Krishan Jaggi, Sh.

Pawan Jaggi, Sh. Sanjay Jaggi and Sh. Rohit Jaggi i.e. defendant''s nos. 10 to 13 respectively; running their business in the name and style of M/s. Jaggi Apple Co.

2. The plaintiff submits that defendant no. 1, through its partners, approached the plaintiff bank for seeking loan facilities in the form of Cash Credit Limit for the purposes of working capital and business activities. The loan application was accepted and a Credit Limit facility in the nature of Cash Credit Limit for Rs. 3, 00,000/- (Rupees Three Lakh Only) was sanctioned to the defendant no. 1 firm. The plaintiff submits that the defendant no. 1 accepted the terms and conditions of the plaintiff bank and agreed to pay interest at the rate of 24% per annum with quarterly rests. It also submits that the defendant no. 1 executed an Agreement of Hypothecation of Goods to secure the aforesaid credit facility, in addition to various other documents.

3. It is the case of the plaintiff that the defendant no. 1 failed and neglected to adhere to the terms and conditions of the said loan facility resulting into overdrawing, above the sanctioned limit of Rupees Three Lakh against clearing cheques which were presented by the defendant no. 1 to the plaintiff bank from time to time. The said clearing cheques, however, stood dishonored by the Drawee bank resulting in overdrawing in excess to the sanctioned limit. In furtherance of this, the plaintiff submits that being partners of the defendant no. 1 firm, the defendant nos. 2 to 5 are jointly and severally responsible for all acts, omissions and commission of the defendant no. 1 firm. And that since defendant no. 6 and 9 stood guarantors and hence their partners are also jointly and severally liable.

4. The plaintiff submits that the outstanding amount of the defendant no. 1 as on April 30, 1996 culminated to a total Rs. 2,07,20,177.85 (Rupees Two Crore Seven Lakhs Twenty Thousand One Hundred Seventy Seven and Paise Eighty Five). The plaintiff further submits that the defendant no. 1 firm acknowledged and confirmed the outstanding debts by virtue of an Undertaking Letter dated January 29, 1994, admitting that a sum of Rs. 1,17,53,507.59 (Rupees One Crore Seventeen Lakhs Fifty Three Thousand Five Hundred and Seven and Paise Fifty Nine) was due to the plaintiff bank as on that date. The plaintiff submits that over and above the Deed of Hypothecation, this defendant has also submitted the collateral security to the plaintiff bank by depositing the Original Title Deed of the property bearing No. B-218, New Subzi Mandi, Azadpur, New Delhi Market, Delhi, thereby creating an Equitable Mortgage in favour of the plaintiff bank. The plaintiff claims that it is therefore, entitled to recover the outstanding dues from the sale proceeds of the aforesaid property.

5. Separate Written Statements have been filed by defendant nos. 1 to 5, 6 to 8 as well as 9 to 13. Defendant''s no. 1 to 3 submit that the claim of the plaintiff is hit by the provisions of Sec. 34 of CPC and that the interest charged is exorbitant and not in conformity with the established RBI Guidelines and Banking Regulations Act, thereby amounting to unfair trade practice on the part of the plaintiff. The answering defendant''s also submit that the present suit is covered

under the HP State Co-Operative Societies Act, 1968 and that the plaintiff bank is a registered society under the said Act and the defendant''s are the members of the society as B-Class Nominal Members. Therefore, any dispute between the parties should be referred to arbitration proceedings according to the Act. Defendant''s no. 6 to 8 submit that they neither offered nor agreed to act as a guarantor, nor had executed any guarantee deed, bond or any other documents for anyone or in favour of the plaintiff and as such, no suit is maintainable. Defendant''s no. 9 to 13 also submit that they neither offered nor agreed to act as a guarantor, nor had executed any guarantee deed, bond or any other documents for anyone or in favour of the plaintiff and as such, no suit is maintainable. And that defendant no. 10 is not the partner of defendant no. 9, nor was he authorized by any of the defendant''s to offer, act or sign any guarantee bond in favour of the plaintiff or stand as guarantor for any of the other defendant''s.

6. Vide Order dated January 31, 2006, defendant nos. 6 to 8 have been proceeded ex parte. Vide Order dated February 25, 2009 the following issues were framed for trial.

a. Whether the plaintiff is entitled to recover an amount of Rs. 2,07,20,177.85 jointly and severally from the defendant''s along with interest as claimed in the suit or at any other rate of interest? OPP

b. Whether the defendant No. 6 to 13 stood guarantors and executed a guarantee deed in favour of the plaintiff for due discharge of the loan amount? OPP

c. Relief.

7. Sh. G.R. Singla was examined as PW-1; Sh. Rakesh Kumar was examined as PW-2; Sh. Bal Krishan Jaggi was examined as DW 1; Sh. Rohit Jaggi was examined as DW 2; Sh. Madan Lal was also examined as a witness.

8. I have heard the Ld. Counsels for the parties and have perused through the records. Issue-wise findings are as under:

Issue No: 1:

9. The burden to prove the first issue was on the plaintiff. In the evidence of PW 1, he deposed that defendant no. 1 firm failed and neglected to adhere to the terms and conditions of the loan facility, which resulted into over drawing above the sanctioned limit of Rs. 3,00,000/-, against the clearing cheques which were presented to the plaintiff bank by defendant no. 1 from time to time. These cheques stood dishonored by the Drawee bank resulting into overdrawing in excess to the sanctioned limit. He further deposed that despite repeated demands from the plaintiff bank, the defendant no. 1 failed to pay the outstanding amounts.

10. In his cross examination, PW 2 stated that a letter intimating the

defendant''s that the loan had been sanctioned was sent to them, but the same was not on court record. Though the letter informing the defendant''s of the sanction of the loan is not on record, the same has not been specifically denied by the defendant no. 1 in its written statement.

11. Further, a Letter of Undertaking in favour of the plaintiff bank is placed on record as Ex-PW-2/11. This Letter of Undertaking is addressed to the Manager of the plaintiff bank from the Partners of defendant no. 1 firm, signed by defendant no. 2. In the said letter, the defendant no. 1 firm refers to the loan being granted for a credit limit of Rs. 3,00,000/-. This letter was admitted to have been signed by defendant no. 2 i.e. Sh. Madan Lal in his cross examination.

The Letter of Undertaking states as under:

We have raised loan from your bank against the sanctioned limit of Rs. 3,00,000.00 expired on 31.12.1993. As on 29.1.1994 we have to pay a loan of Rs. 1,17,53,507.59 (Rupees One Crore Seventeen Lakhs Fifty Three Thousand Five Hundred and Seven and Fifty Nine Paise only) to the Bank against the said sanctioned limit.

At present, the money is invested with the growers of Kashmir and payments are pending in the market, which is expected to be received in the month of January and April, 1994.

We undertake that the bank loan which is outstanding to the tune of Rs. 1,17,53,507.59 with up to date interest will be liquidated in full by the end of 15th March, 1994.

12. As per the account maintained by the plaintiff bank (in its ordinary course of business), a sum of Rs. 1,17,53,507.59 was outstanding against the defendant''s as on January 29, 1994. The relevant extracts of the plaintiff bank''s record are proved as Ex. PW-2/13 (Colly.). This sum was admitted by the defendant no. 1 firm vide its Letter of Undertaking as observed above. The plaintiff has also claimed interest from January 30, 1994 @ 24% p.a. at quarterly rests and adding the same to the aforesaid acknowledged amount, it has claimed a total sum of Rs. 2,07,20,177.85/-. In addition, the plaintiff has also claimed future interest @ 24% p.a. from the date of filing of the suit till the date of realization.

13. The defendant No. 6 had executed a promissory note in favour of the plaintiff. The same is proved as Ex. PW 2/5, which clearly stipulates the interest to be 24% p.a. Thus, it stands proved that the plaintiff would be entitled to the claimed amount with pendente lite and future interest @ 24% p.a. from the date of filing of the suit till the date of its realization. The issue is decided accordingly in favour of the plaintiff.

Issue No. 2:

14. The question for decision would be as to whether in addition to the defendant''s No. 1 to 5, who have availed the loan facilities and are held to be

liable to pay, as discussed above, the guarantors who are defendant''s No. 6 to 13 would also be liable along with them and if so, which are those defendant''s. The plaintiff has tried to establish the liabilities of these defendant''s based on the loan application form Ex. PW 2/4, which would evidence having been signed by partner of defendant No. 6 and Manager of defendant No. 9. Relying upon the decision of this court in Himachal Pradesh State Co-Operative Bank Ltd. Vs. Sh. Gulshan Kumar & Ors., CS (OS) 1221/1996, the learned counsel appearing for the defendant''s No. 9 to 13 contends that the loan application, per se, in the absence of there being any letter of guarantee or guarantee bond/agreement favouring the plaintiff, would not create guarantee by these defendant''s. This court in the afore-cited case of Himachal Pradesh State Co-Operative Bank Ltd. Vs. Sh. Gulshan Kumar & Ors. (supra), wherein similar issue was there, held thus:

Ex. PW-1/A being a mere application does not bind either party save and except requiring said parties to comply with the terms of the application. I do not find any operative words therein to make defendant''s 3 and 6 as liable as guarantors. Said defendant''s have only shown their willingness to stand as guarantors. Ex. PW-2/5 shows that the guarantee offered i.e. liability taken over by defendant no. 3 was limited to Rs. 3 Lacs, the credit limit extended by the plaintiff to defendant no. 2 as sole proprietor of defendant no. 7.

15. The aforesaid observations of this court being between the same parties as in the instant suit, are squarely applicable to this case as well. That being there, the defendant''s could not be made liable merely on the basis of the loan application.

16. The matter does not rest here. Admittedly, there was no letter of guarantee or guarantee bond/agreement executed by the defendant No. 9. in favour of the plaintiff for the loan facility that was enjoyed by the defendant''s No. 1 to 5. On the other hand, defendant No. 6 through its partner, had executed a letter of guarantee (Ex. PW 2/3) in favour of the plaintiff. By virtue of this, this defendant No. 6 bound itself to the liability of Rs. 3 lakhs with interest @ 24% p.a. The liability, as envisaged under this Ex. PW 2/3, was to be joint and several. That being the state of affairs qua defendant''s No. 6 to 8, the liability of these defendant''s certainly existed, which was not in the case of defendant''s No. 9 to 13. Now, the question lies as to what extent would be the liability of these defendant''s No. 6 to 8. According to Section 133 of the Indian Contract Act, if there is any variance made without the surety''s consent, then the surety is discharged with respect to the transactions that occurred subsequent to the variance. It has been observed in the case of Himachal Pradesh State Co-Operative Bank Ltd. v. Sh. Gulshan Kumar & Ors. (Supra), referring to variance as under:

133. Discharge of surety by variance in terms of contract. Any variance, made without the surety''s consent, in terms of the contract between the principal and the creditors discharges the surety as to transactions subsequent to the variance.

It is obvious that without the surety''s consent plaintiff has varied the terms of the contract between the plaintiff and defendant nos. I and 2. I accordingly hold that the defendant''s no. 3 to 5 stand discharged from their liability of guarantee pertaining to transactions subsequent to the variance. Thus, liability of defendant''s 3 to 5 is limited to Rs. 3 lacs plus interest thereon.

There is no evidence on record to state that the guarantors were informed of the variance i.e. that they were liable against a sum greater than Rs. 3,00,000/- as claimed in the instant suit. Applying this legal provision, I find that the liability of defendant nos. 6 to 8 as guarantors is only limited to Rs. 3,00,000/-, as agreed under the letter of guarantee.

17. Thus, the conclusion comes out to be that the defendant''s No. 6 to 8 stood guarantee of a sum of Rs. 3 lakhs with interest @ 24% p.a. in favour of the plaintiff and there were no such liability of defendant''s No. 9 to 13. The issue is decided accordingly.

Relief:

18. In view of my above discussion, the plaintiff is entitled to a decree of Rs. 2,07,20,177.85/- with interest @ 24% p.a. from the date of filing of the suit till the date of realization. However, the liability of the defendant''s No. 6 to 8 shall be joint and several to the extent of Rs. 3,00,000/- (Three Lakhs only) with interest Pendente lite and future @ 24% p.a. Consequently, decrees is passed in favour of the plaintiff and against the defendant''s No. 1 to 5 and 6 to 8 jointly and severally of a sum of Rs. 2,07,20,177.85/- with interest @ 24% p.a. from the date of filing of the suit till the date of realization, but, the joint and several liability of the defendant''s No. 6 to 8 would be limited to the tune of Rs. 3 lakhs with interest Pendente lite and future from the date of filing of the suit till the date of realization @ 24% p.a. Decree be drawn accordingly. Suit stands disposed of.

