(2017) 04 DEL CK 0131

In the Delhi High Court

Case No : 14 of 2016

INDUSIND BANK — APPELLANT

Vs

LT. COL. M.P.S. BHATIA & ANR. — RESPONDENT

Date of Decision : 27-04-2017

Acts Referred:

Code of Civil Procedure, 1908, Order 21Rule 46(A), Order 21Rule 46(I)

Citation : (2017) 04 DEL CK 0131

Hon'ble Judges : Valmiki J.Mehta

Bench : SINGLE BENCH

Advocate : V.K. Gupta, Arun Mahajan, Avinash Kumar Tyagi

Final Decision : Allowed

Judgement

1. This Execution First Appeal is filed by the appellant/objector against the order of the executing court dated 9.5.2016 by which the executing court has directed the appellant/bank to seek discharge of the bank guarantee issued by it in the favor of the Union of India so that the executing court thereafter in execution would be able to seek encashing of the fixed deposit amount lying with the appellant/bank as lien for the bank guarantee issued in favour of the Union of India and in order to satisfy the money decree in favor of the respondent no.1/decree holder. Putting it in other words, in execution of the decree of the respondent no.1/decree holder herein the fixed deposit of the respondent no.2/judgment debtor was lying with the

appellant/bank, but the appellant/bank had taken this fixed deposit as 100% cash margin for issuing of a bank guarantee in favour of the Union of India/Government, and consequently the appellant/bank had a first charge/lien/entitlement to encash the fixed deposit in case any liability arose of the appellant/bank towards the Union of India on account of Union of India encashing bank guarantee (and under which bank gurantee the appellant/bank would have had to pay the amounts to the Union of India), and therefore once the bank guarantee is discharged then the fixed deposit will no longer have a lien of the appellant/bank and accordingly the fixed deposit will be available for satisfaction of the money decree in favor of the respondent no.1/decree holder.

2. The facts of the case are that the respondent no.1/decree holder was successful in getting a money decree of Rs.6,72,000/- along with costs and interest at 8% per annum against the respondent no.2/judgment debtor/M/s Swaraj Overseas Limited. Execution petition was filed by the respondent no.1/decree holder for seeking an amount of Rs.7,47,513/-. On 14.2.2011, the executing court issued warrants of attachment with respect to the Fixed Deposit No.0005F108070036 lying with the appellant/bank at its Barakhamba Road Branch at New Delhi. This attachment order dated 14.2.2011 was served upon the appellant/bank on 23.2.2011. Admittedly, as on this date the fixed deposit was lying with the appellant/bank with the charge/lien of the appellant/bank on the said fixed deposit on account of bank guarantee which was issued by the appellant/bank in favour of the Union of India valid for claim upto 21.7.2016. In the meanwhile, certain compromise took place between the respondent no.1/decree holder and the respondent no.2/judgment debtor as a result of which the respondent no.2/judgment debtor agreed to pay a total sum of Rs.7,70,000/- in three instalments in satisfaction of the decree, but the

respondent no.2/judgment debtor after paying the first instalment of Rs.2,00,000/- defaulted on the payment of the agreed amount, and consequently a fresh attachment order dated 6.9.2011 was issued by the executing court against the fixed deposit. On 18.11.2011, the appellant/bank appeared in the Court and informed that the fixed deposit mentioned in the attachment order is for securing the bank guarantee given by the appellant/bank in favour of the Union of India. Effectively, therefore, the appellant/bank pleaded that it was a garnishee and consequently the appellant/bank as a garnishee having a lien on the fixed deposit filed objections to the attachment order.

3. By the impugned order the trial court has held that the appellant/bank has wrongly extended the bank guarantee validity period during the period of attachment, and since the bank guarantee has been illegally extended by the appellant/bank till 26.5.2021, therefore the bank guarantee should be got discharged from the Union of India and the respondent no.1/decree holder should be paid the amount of the fixed deposit. The operative portion of the order of the trial court is contained in para 13 of the impugned order, and this para 13 reads as under:-

"13. In view of the judgments cited by the Learned counsel for the bank itself and in view of the peculiar facts of the present execution petition, I have no hesitation in holding that the act of the bank in extending the validity of the bank guarantee from January, 2016 to January, 2021 at the request of the judgment debtor without bringing the same to the notice of the Executing Court shows that the action of the bank is malafide and was in furtherance of collusion between the judgment debtor and the bank so as to frustrate the execution of the present decree. What is glaring is that the bank was appearing in the execution petition and had filed objections regarding the attachment orders of the FDR of the judgment debtor. Thus, this is a case of exceptional circumstance and of fraud. Consequently, the bank is directed to revoke the bank guarantee issued by it to the Government of India on behalf of the judgment debtor by writing to the concerned Ministry and seeking its approval for the same, which can be done as per the terms of the bank guarantee itself. The bank should seek the approval of the concerned Ministry within a period of one month from today. The bank is further directed to attach a copy of this order while writing to the concerned Ministry for seeking its approval for revoking the bank guarantee. Accordingly, the application under Section 151 of the Code of Civil Procedure, 1908 moved by the decree holder is disposed off in the above terms."

4. It is therefore seen that the court below has arrived at a conclusion that the appellant/bank was in collusion with the respondent no.2/judgment debtor and the appellant/bank had no right to extend the validity of the bank guarantee from January, 2016 to January (sic: May), 2021 on account of the fact that the appellant/bank was aware of the attachment order which was passed against the fixed deposit receipt lastly on 6.9.2011.

5. I am afraid that the executing court has fallen into a basic error in holding that there is a collusion between the appellant/bank and the respondent no.2/judgment debtor because the bank guarantee has been extended from January, 2016 to May, 2021 in favour of the Union of India. The basic error in the impugned order is that the executing court has presumed that merely because an attachment order was issued against the fixed deposit, the attachment order by that fact itself will become a valid attachment order. In fact, the position is completely otherwise and the complete procedure with respect to what should be the procedure for a garnishee order is contained in Order XXI Rule 46 (A) to 46 (I) CPC. The provisions of Order XXI Rule 46(A) to (I) CPC make it clear that when execution proceedings are filed against a judgment debtor and the property of the judgment debtor is lying with a third person then that third person is called a garnishee. In simple words garnishee is the debtor''s debtor. The garnishee or debtor''s debtor is bound by the attachment order with respect to the property of the judgment debtor lying with the garnishee only if the garnishee has no right over the property of the judgment debtor. If the garnishee has a right on the property of the judgment debtor lying with the garnishee then no valid attachment can be issued with respect to the property lying with the garnishee and objections can be thus filed by

the garnishee and once the court finds that garnishee has a valid right to the property of the judgment debtor lying with the garnishee then the attachment order has to necessarily fail.

6. The facts of the present case show that the bank guarantee was issued by the appellant/bank against 100% cash margin of the fixed deposit in question. This bank guarantee which was issued by the appellant/bank in favour of the Union of India was much prior to the attachment orders dated 14.2.2011 and 6.9.2011. Once that is so, and the appellant/bank had custody of the fixed deposit with its first charge/lien for satisfying its claim against any future liability towards the Union of India on account of encashment of the bank guarantee, and therefore, the fixed deposit amount was available to adjust the amount of such fixed deposit of the respondent no.2/judgment debtor on account of appellant/bank having made payment on behalf of the respondent no.2/judgment debtor to the Union of India because of encashment of the bank guarantee. In such circumstances then the appellant/bank has valid claim of/as a garnishee to the fixed deposit in question, and thus such fixed deposit could not have been validly attached by the executing court. Any attachment order therefore passed in the present case had necessarily to fail. Therefore, simply on the ground that attachment orders were issued by the executing court on 14.2.2011 and 6.9.2011, the same would not mean that the appellant/bank by issuing of such attachment orders had become liable as a garnishee to pay the amount of fixed deposit to the executing court for satisfaction of the execution proceedings filed by the respondent no.1/decree holder against the respondent no.2/judgment debtor.

7. Learned counsel for the respondent no.1/decree holder argued that in the bank guarantee there is a clause 4 which provides that the bank guarantee can be revoked with the consent of the Government and consequently the appellant/bank should be forced to

approach the Government for revocation of the bank guarantee. However, this argument is misconceived because courts cannot force parties to enter into a specific contract or a specific contract with specific terms or revoke contract already entered into or modify the contract. Parties have complete freedom to enter into the contracts which they want, once the contracts are legal, and thus courts cannot undo contracts which are already made i.e courts cannot force the parties being the appellant/bank and the Union of India to undo its contract by revoking the bank guarantee when the parties themselves, being the appellant/bank and the Union of India, do not want to do so. This is not the purpose of the executing court, and this procedure is not a procedure provided under Order XXI Rule 46 (A) to (I) CPC. The entitlement of the decree holder is therefore only to proceed against an encumbered property of the judgment debtor and not a property of the judgment debror over which a garnishee has a right, and in such circumstances as per the procedure under Order XXI Rule 46 (A) to (I) CPC the attachment order against the garnishee has to necessarily fail.

8. In view of the above discussion, the impugned order dated 9.5.2016 is set aside. The appeal stands allowed. The appellant/bank will stand discharged from the attachment order as also any liability to get the bank gurantee cancelled and which is issued by the appellant/bank in favour of the Union of India. Of course, the respondent no.1/decree holder is entitled to continue the execution proceedings against any other properties of the respondent no.2/judgment debtor besides the fact that if at any stage the subject fixed deposit is available with the appellant/bank in a condition that it is an unencumbered fixed deposit over which the appellant/bank would have no lien, then the respondent no.1/decree holder will be entitled to seek fresh attachment proceedings and any encumbered fixed deposit amount lying with the appellant/bank will be available for satisfaction

of the money decree of the respondent no.1/decree holder.

9. The appeal is allowed on the aforesaid terms leaving the parties to bear their own costs.