

(2001) 02 BOM CK 0057

In the Bombay High Court

Case No : Summons for Judgment No. 266 of 1999 in Summary Suit No. 491 of 1999

Jetu Jacques Taru Lalvani

APPELLANT

Vs

Solestrap Industries Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 20-02-2001

Acts Referred:

Contract Act, 1872 — Section 126

Negotiable Instruments Act, 1881 (NI) — Section 30, 37, 80

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 25

Citation : (2001) 3 ALLMR 282 : (2001) 4 BOMLR 737 : (2002) 110 CompCas 831 : (2001) 3 CompLJ 35 : (2001) 3 MhLj 389

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : N.K. Mudnaney, for the Appellant; Vimadalal, instructed by Vimadalal and Co., for the Respondent

Judgement

Dr. D. Y. Chandrachud, J.—In October, 1997, the Plaintiff agreed to grant to the Second Defendant, a Bill Discounting facility to the extent of Rs. 2.50 crores in respect of Bills of Exchange drawn or accepted by or on behalf of the Second Defendant. A personal guarantee was executed by the Third Defendant. A Bill of Exchange dated 3rd October, 1997 in the amount of Rs. 49,98,480/- was drawn by the First Defendant and was duly accepted by the Second Defendant payable to the Plaintiff 90 days after date. The Plaintiff is also the holder in due course of another Bill of Exchange dated 14th October, 1997, in the amount of Rs. 61,48,920/- drawn by the First Defendant and accepted by the Second Defendant which was payable to the Plaintiff 90 days after date. Similarly, a third Bill of Exchange dated 22nd October, 1997, in the amount of Rs. 80,24,600/- drawn by the First Defendant and accepted by the Second Defendant was payable to the Plaintiff 90 days after date. The three Bills of Exchange as aforesaid were due for payment on 1st January, 1998, 12th January, 1998 and 25th January, 1998. The Plaintiff has averred in para 6 of the Plaint that the

Defendants having agreed to discounting charges at the rate of 28% compounded quarterly, the Plaintiff paid to the First Defendant, the discounted amount by means of cheques which were drawn in favour of the First Defendant in respect of each of the said Bills of Exchange. Upon presentation of the Bills of Exchange on their due dates to the Second Defendant, the Bills of Exchange came to be dishonoured by non-payment. The Second Defendant in discharge of its liability, Issued three cheques dated 1st January, 1998, 12th January, 1998 and 25th January, 1998, which, upon presentation, were dishonoured by the Bankers with the remarks, "Refer to Drawer".

2. In part payment of the amount due under the Bill of Exchange dated 3rd October, 1997 in the amount of Rs. 49,98,480/-, the Second Defendant paid an amount of Rs. 25 lakhs on 9th January, 1998. As on 28th January, 1998, the amounts of Rs. 24,98,480, Rs. 61,46,920/- and Rs. 80,24,620/ were payable by the Defendants to the Plaintiff. The Plaintiff addressed a letter dated 28th January, 1998. The Second Defendant by a letter dated 31st January, 1998 confirmed that the aforesaid amounts were due and payable to the Plaintiff. Thereafter, the Second Defendant on 27th February, 1998 paid the balance of the principal amount due in respect of the Bill of Exchange dated 3rd October, 1997, so that the entire principal amount under the said Bill of Exchange has been paid. In October 1997, the 2nd Defendant issued to the Plaintiff a further cheque for Rs. 25 lakhs in part payment of the amount due under the Bill of Exchange dated 13th October, 1997. But, the said cheque was also returned as dishonoured upon presentation. On 7th March, 1998, the Second Defendant paid an amount of Rs. 25 lakhs against the said Bill of Exchange, leaving as balance a sum of Rs. 36,48,920/-. By letters dated 24th March, 1998 and 18th April, 1998, the Second Defendant assured that a payment schedule would be worked out to pay the outstanding dues of the Plaintiff.

3. Insofar as the Second Defendant is concerned, it has been stated that on the letter of the Plaintiff dated 8th December, 1998, the Second Defendant had by an endorsement confirmed that an amount of Rs. 1,51,25,844 was due and payable to the Plaintiff.

4. In para 24 of the Plaint, the claim for interest Insofar as the First Defendant is concerned, is restricted to interest at the rate of 18% per annum, since for the period subsequent to 8th December, 1998, there has been no confirmation as such of the amount which is due and payable. The claim at the rate of 18% per annum has been made on the basis of Section 80 of the Negotiable Instruments Act, 1881.

5. The claim in the Summary Suit is for the payment of an amount of Rs. 1,39,69,099/- comprised of the principal amount of Rs. 1,16,73,540/ with interest thereon at the rate of 18% per annum until the date of the filing of the suit together with further interest from the date of the suit until payment of realisation.

6. Insofar as the Second Defendant is concerned, by an order dated 6th February, 2001, the hearing of the Summons for Judgment has been adjourned sine die since it is common ground between the learned Counsel that a Reference under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 has been registered against the Second Defendant. Since the Third Defendant has been sued in his capacity as a guarantor, the Summons for Judgment was also adjourned sine die qua the Third Defendant in view of the provisions of Section 22 of the Act.

7. The role and position of the First Defendant is that of a drawer of the Bills of Exchange. Insofar as the First Defendant is concerned, it is also common ground that the Plaintiff who discounted the Bills of Exchange drawn by the First Defendant, paid the amounts thereunder upon discounting to the First Defendant. The liability of the First Defendant as a drawer cannot be disputed by virtue of the provisions of Section 30 of the Negotiable Instruments Act, 1881. Section 30 of the Act postulates that the drawer of a Bill of Exchange is bound, in case of dishonour by the drawee or acceptor thereof to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer. The fact that the notice of dishonour has been issued to the First Defendant is again not disputed. The learned Counsel appearing on behalf of the First Defendant, however, submitted that u/s 37 of the Negotiable Instruments Act, 1881, the drawer of the Bill of Exchange is the principal debtor only until acceptance of the bill, after which and upon acceptance, he becomes the surety for the acceptor. That being the position, it was sought to be submitted that as the surety for the acceptor the First Defendant would be entitled to the benefit of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 since the acceptor who is the Second Defendant is a Sick Industrial Company.

8. Section 37 of the Negotiable Instruments Act, 1881 provides as follows :

"37. Maker, drawer and acceptor principals.-The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be."

From the aforesaid provision, it would be clear that the drawer of the Bill of Exchange until acceptance and the acceptor are in the absence of contract to the contrary, liable thereon as principal debtors. The other parties are liable as sureties for the maker, drawer or acceptor as the case may be. Consequently, until the Bill of Exchange comes to be accepted, the drawer is in the position of the principal debtor. The submission of the learned Counsel appearing on behalf of the First Defendant is that after the acceptance, the First Defendant became a surety and, as a surety, within the meaning of Section 126 of the Contract Act, 1872, he would be a guarantor, who would be equally protected by the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. Having given my anxious consideration to this submission, I do not see any

substance therein. Section 22 of the Act provides for a number of consequences where in respect of an Industrial Company, proceedings under the Act of the nature referred to in the initial part of Section 22 are pending. These proceedings would include an enquiry u/s 16, the preparation of a scheme u/s 17, a sanctioned scheme being under implementation, or an appeal being pending u/s 25. If any of these proceedings is pending, then, the following consequences would ensue : (1) no proceedings for the winding up of the Industrial Company; (2) no proceedings for the execution, distress or like against the property of the Industrial Company; (3) no proceedings for the appointment of a Receiver in respect of the properties of the Industrial Company; (4) no suit for recovery of money against the Industrial Company; (5) no suit for the enforcement of any guarantee in respect of any loan or advance granted to any Industrial Company shall lie or be proceeded with further except with consent of the Board or the Appellate Authority.

9. In the present case, we are concerned with the words, "any guarantee in respect of any loan or advance granted to any Industrial Company". In its recent Judgment in *Patheja Bros. Forgings & Stamping v. I.C.I.C.I. Ltd.*," the Supreme Court while construing the provisions of Section 22 of the Act, held thus :

"The words are crystal clear. There is no ambiguity therein. It must, therefore, be held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the concerned Industrial Company will lie or can be proceeded with without the sanction of the Board or the Appellate Authority under the said Act."

The Court held that it was not possible to construe the words of Section 22 as meaning that only a suit against the Industrial Company would not lie without the consent of the B.I.F.R. or the Appellate Authority. In other words, there is no requirement in Section 22 that the suit should be against the Industrial Company alone. A suit for the enforcement of a guarantee in respect of a loan granted to a Company in respect of which a reference under the Act or an appeal is pending, would, therefore, clearly attract the provision of Section 22. In the case, which was decided by the Supreme Court, a suit for the recovery of loans which were advanced to an Industrial Company was filed and the guarantors were impleaded since their guarantee was sought to be enforced. In para 13 of its Judgment, the Supreme Court noted that as of the date of the Judgment of the Court, an appeal by the Industrial Company was pending under the Act before the Appellate Authority. Consequently, the Supreme Court concluded that Section 22 would be attracted in such a case. The Court held as follows :

"Therefore, the first respondent's suit for the enforcement of the guarantee in respect of the loans granted to the first appellant cannot be proceeded with unless consent as required by Section 22 is obtained."

10. From the provision of Section 22 of the Act and the Judgment of the Supreme Court what would emerge is that no suit for enforcement of a

guarantee in respect of any loans or advance granted to the Industrial Company is maintainable where any of the proceedings are at the stage referred to in the earlier part of Section 22. What is important, however, in order to attract Section 22 is that the suit for the enforcement of the guarantee must be in respect of a loan or advance granted to the Industrial Company. In the present case, the facts are that the Plaintiff discounted certain Bills of Exchange which were drawn by the First Defendant and accepted by the Second Defendant. The payments under the Bills of Exchange were made to the First Defendant. Therefore, there was clearly no loan or advance granted to the Industrial Company, the Second Defendant, in respect of whom proceedings are pending before the B.I.F.R. The amounts covered by the Bills of Exchange were upon discounting never paid to the Second Defendant, but were paid to the First Defendant as a drawer of the said Bills. In the circumstances, Section 22 of the Act can have no application to the present case. The Judgment of the Supreme Court in Patheja Bros. envisages in paras 7, 12 and 13 that the suit for the enforcement of the guarantee has to be in respect of a loan granted to a Sick Industrial Company in order to attract Section 22. Where no loans or advances are granted to a Sick Industrial Company, then the suit for the enforcement of the obligation, as in the present case, of the drawer of a Bill of Exchange is not hit by the provisions of Section 22.

11. Having regard to the aforesaid situation, I am of the view that there is absolutely no substance in the defence urged on behalf of the First Defendant. The First Defendant is liable on the Bill of Exchange u/s 30 of the Negotiable Instruments Act, 1881 as the drawer thereunder. The Summons for Judgment is liable to be made absolute and the Plaintiff would be entitled to a decree as prayed for as against the First Defendant in terms of prayer Clause (a). The Plaintiff would be entitled to interest at the rate of 18% per annum from the date of the suit until payment or realisation.

12. The learned Counsel appearing on behalf of the Plaintiff has tendered the original documents together with a list which are taken on record and marked as Exh. A collectively.

13. The Summons for Judgment is made absolute. There shall be a decree in terms of prayer Clause (a) as against the First Defendant with interest at the rate of 18% per annum from the date of the suit until payment or realisation and with costs of the suit.