
(2010) 01 AP CK 0015
In the Andhra Pradesh High Court
Case No : Writ Petition No. 28430 of 2008

Murali D. Kanuri

APPELLANT

Vs

Debt Recovery Appellate Tribunal and Others

RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 2(8), 4
Companies Act, 1956 — Section 292(1)
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 133, 134, 135, 138, 139
Limitation Act, 1908 — Article 115
Limitation Act, 1963 — Article 55
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(3), 22(5), 22(6), 3(1)

Citation : (2010) 3 ALT 374

Hon'ble Judges : Noushad Ali, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : V.T.M. Prasad, for the Appellant; A. Krishnam Raju and Deepak Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—By filing this writ petition under Article 226 of the Constitution of India, petitioner seeks to set aside the judgment of the Debt Recovery Appellate Tribunal, Chennai in R.A. No. 15 of 2006, dated 22.09.2008 by issuing a writ of Mandamus (wrongly prays for Mandamus instead of Certiorari) as it is arbitrary, contrary to law, illegal and nonest in the eye of law and opposed to the relevant provisions of the Indian Stamp Act, Companies Act, Contract Act, Negotiable Instruments Act, Bankers Book of evidence Act etc.

Facts in nutshell, which give raise to filing of this writ petition, are as under:

1. M/s.Lakshmi Porcelains Limited-R4 herein (for short, "LPL/R4") was jointly promoted by the Andhra Pradesh Industrial Development Corporation (for short, "APIDC") as promoters and major share holders, and by the writ petitioner as a

technocrat co-promoter as a joint sector venture. In all LPL had ten directors, of whom three were nominated by the APIDC and IDBI, two by ICICI and three directors were independents from public and as approved by the IDBI. LPL availed the Open Cash Credit, Term Loan -I (Funded Interest Term Loan), Term Loan - II (Funded Interest Term Loan) and Term Loan - III (Working Capital Term Loan) facilities under letter of credit for its business at Hyderabad, after executing necessary documents in favour of Andhra Bank and Canara Bank i.e., respondent Nos. 2 and 3 respectively (for short, "R-2 and R-3). LPL created mortgage of their immovable property in favour of R-2 and R-3 as well as IDBI, IFCI and ICICI. The loan limits were subsequently enhanced, for which the writ petitioner agreed to guarantee the due repayment of all the amounts due under the said accounts of the LPL and executed deeds of guarantee in favour of R-2 and R-3, apart from acknowledging the liabilities by the LPL and the writ petitioner. Since the LPL and the writ petitioner, who is the Managing Director of LPL, committed default in repayment of the loan amounts availed, the banks filed O.A. No. 698 of 1998 before the Debts Recovery Tribunal, Bangalore and on transferring the same to the Debts Recovery Tribunal, Hyderabad, it was numbered as O.A. No. 1652 of 1999, for recovery of a total sum of Rs. 9,62,73,895.18ps. (out of which Rs. 4,80,16,244.57ps. in favour of Andhra Bank -R-2 and Rs.4,82,57,650.61ps. In favour of Canara Bank - R-3). It was pleaded by R-2 and R-3 that at the request of LPL, they sanctioned/renewed/enhanced the OCC limit of Rs.60.00 lakhs each, Bills limits of Rs.45.00 lakhs each, Letter of Credit limit of Rs.7.5 lakhs each and the Bank Guarantee limit of Rs.33.50 lakhs each. Both the banks agreed to reduce the rate of interest of the OCC account and Bills Discount account to 15% funding of interest on OCC Account from July, 1985 to 30.09.1987 amounting to Rs. 13.20 lakhs due to each bank and the same was accordingly termed as Funded Interest Term Loan -1. The interest on Cash Credit from 01.10.1987 to 30.06.1988 amounting to Rs.7.30 lakhs due to each bank was funded and termed as Funded Interest Term Loan II. The irregularity in Cash Credit as on 30.06.1987 amounting to Rs. 15.50 lakhs due to each bank was converted as Term Loan-III (Working Capital Term Loan). The OCC Limits of Rs.60.00 lakhs were enhanced to Rs.75.00 lakhs by Andhra Bank, for which LPL also availed ad hoc OCC Limit of Rs. 25.00 lakhs and ad hoc Bills limit of Rs. 25.00 lakhs from R-2. R-2 enhanced the Bills facility from Rs.45.00 lakhs to Rs.90.00 lakhs and the L.C. limit was enhanced to Rs.30.00 lakhs. Both the banks at the request of LPL, also issued various bank guarantees in favour of third parties. All the amounts were secured by way of hypothecation of movables and joint equitable mortgage of immovable properties in favour of R-2 and R-3-banks and R-5 to R-7/3rd to 5th defendants, besides the personal guarantee of the writ petitioner. As the LPL and the writ petitioner failed to liquidate the loan outstanding, the banks filed the above O.A. for recovery of a sum of Rs. 9,62,73,395.18ps.

2. The Official Liquidator, representing the LPL, filed a report and was called absent and R-5 to R-7 are set ex parte, before the Tribunal. The writ petitioner,

who filed the written statement, disputed the claim of the banks contending that he is not liable in his personal capacity as a guarantor for the loans availed by LPL. It is stated that LPL was jointly promoted by him and his associates along with the promoter APIDC in the joint sector. After a series of unforeseen problems like, a portion of roof collapse; bulging of Tunnel Kiln due to substandard quality refractory bricks supplied by the Government of India company, namely M/s. Burn Standard Company Limited, and the illegal strike by workmen, LPL was able to start Tunnel Kiln operations only in September, 1989. LPL also filed a civil suit in O.S. No. 1863 of 1989 in the Court of IV Additional Judge, City Civil Court, Hyderabad against M/s. Burn Standard Company for an amount of Rs. 1,45,77,743/- by paying a court fee of Rs. 1,48,296/-. LPL in all had ten directors, eight of whom were either nominated by the APIDC/IDBI or approved by IDBI. Thus the writ petitioner, who is the Managing Director of LPL was in a hopeless minority on the board. The Board constituted a core committee called Business/Management Committee consisting of three directors of which the writ petitioner was one and the other two being the nominees of APIDC and IDBI. The said committee was incharge of day to day supervision and operation of LPL. Even in the said committee, the writ petitioner was in a minority. R-2 has not furnished the statement of accounts for the period May 1984 to 31.12.1990, during which period the LPL functioned. Thus, the statement of accounts furnished by R-2 is not in accordance with Rule 9 of Debts Recovery Tribunal (procedure) Rules, 1993 for the reason that it's statement of accounts does not show the details of debt due from LPL and the circumstances under which such a debt has become due and for the said glaring omission, the statement of accounts furnished by R-2 is hit by Section 139 of the Indian Contract Act, 1872 (for short, "I.C. Act"). The incomplete and faulty statement furnished and R-2's omission in not furnishing an accurate statement of accounts will handicap writ petitioner to contest the claim of banks. The personal guarantees produced by R-2 and the amounts mentioned in them are not reflected in the statement of accounts furnished by R-2. The statement of accounts furnished by R-2 and R-3 are not in accordance with law, as laid down by the Hon"ble Supreme Court in Central Bank of India Vs. Ravindra and Others, Both the banks failed to provide adequate working capital to LPL, which they had promised and were duty bound to do and the same is in violation of the mandate contained in Section 139 of the I.C. Act. Many consortium meetings of R-2 and R-3 were held on 01.08.1989, 15.08.1989, 08.09.1989, 19.01.1990, 12.02.1990, 12.03.1990 and 06.08.1990. Apart from this, a consortium meeting of Financial Institutions i.e., IDBI, IFCI, ICICI, R-2, R-3 and RBI was held on 05.10.1990. A joint meeting consisting of BIFR nominee, the Financial Institutions, R-2 and R-3 were held on 16.11.1992 in IDBI Office, Bombay. The reports of the IDBI clearly reveal that the IDBI had clearly expressed to both the banks for providing need-based working capital urgently to LPL, which increases its working capital limit. This Court ordered for winding up of LPL in R.C.C. No. 6 of 1993 by appointing Official Liquidator, and the writ petitioner was not a party neither before the BIFR nor AAIFR and that the Official Liquidator appointed by this Court sold the LPL unit for a meager sum

of Rs. 1.75 crores, though the valuers appointed by the Official Liquidator valued the assets of LPL at Rs. 9.239 cores. Both the banks and the financial institutions, which were parties to the said proceedings, have never informed the writ petitioner about the said sale and, therefore, he stands discharged of his personal guarantees as per the provisions of Section 139 of the I.C. Act. In Para 17 of his reply, a list of documents, deeds and instruments filed by the banks are claimed to be hit by provisions of Section 292(1)(c) and Regulation 84 of Table A of Schedule-I of the Companies Act, 1956. The personal guarantees produced by R-2 and executed after the Board resolution dated 20.12.1988, are in no way connected nor can be correlated to the various fund and non-fund amounts mentioned in the said resolution and, therefore, no liability can be fastened on the writ petitioner. The four personal guarantees relied upon by R-3 are invalid for the reason that they do not reflect consideration amount or the amount in the statement of accounts and that they are also hit by the provisions of Section 139 of the I.C. Act. The note in the covering letter of all the guarantees i.e., "This is an addition to the guarantee already executed by me/us and held by you" have not been struck off, which means that there is another guarantee given by the writ petitioner to R-3, prior to the date of the said guarantee. Since R-3 failed to produce the said guarantee, the said guarantee is a brought one by itself because in the words, in addition to the guarantee already executed by the writ petitioner/in his behalf and held by you, there is a variance between the four personal guarantees and the statements of accounts furnished by R-3, due to which the provisions of Sections 133 and 139 of the I.C. Act are attracted, and hence the personal liability of the writ petitioner is discharged. It is further contended that there is no inter se agreement between R-2 and R-3-banks and they have failed to file any document in support of the same. Therefore, for the said reason alone the application is not maintainable and the writ petitioner is not personally liable for the claim made by both the banks in the said O.A.

3. In order to prove the claim, two witnesses were examined on behalf of respondent-banks as A.W.1 and A.W.2 and marked Exs.A-1 to A-105 on their behalf. The writ petitioner has filed his evidence in the form of affidavit and the documents were marked as Exs.D-1 to D-74 and he was cross-examined by the respondent-banks and marked Exs.A-106 to A-108.

4. The Tribunal by the impugned order dated 13.12.2005 decreed the O.A. against LPL and dismissed the claim against the writ petitioner, granting liberty to both the banks to enforce their claim against LPL through due process of law, subject to all the rights of the IDBI, IFCI, and ICICI-R5 to R-7/Defendant Nos. 3 to 5 and ordered to issue Recovery Certificate accordingly.

5. Aggrieved by the dismissal of the claim against the writ petitioner, R-2 and R-3 carried the matter in appeal before the Debt Recovery Appellate Tribunal, Chennai-R1 herein in R.A. No. 15 of 2006. The Appellate Tribunal by the impugned order dated 22.09.2008 allowed the R.A. and modified the order passed by the Tribunal in O.A. No. 1652 of 1999 dated 13.12.2005 holding that both the LPL and the

writ petitioner, who are defendants 1 and 2 in the O.A., are jointly and severally liable to pay the amounts claimed by R-2 and R-3 -applicants in O.A.

6. Questioning the correctness of the same, the present writ petition has been filed contending that as R-2 and R-3 claimed that they have allegedly given a fund and non-fund based amount of Rs. 292 lakhs (R2-Rs.146 lakhs and R-3-Rs.146 lakhs) to LPL and as the alleged amount is very huge, it is beyond the personal capacity of the petitioner as an individual to pay the huge amount, if the default is committed by LPL. Knowing fully well, R-2 and R-3 banks have insisted for a personal guarantee to be executed by the writ petitioner and when he questioned about the purpose for which the said personal guarantee is to be executed, the banks openly and explicitly said that these personal guarantees from the petitioner were required for the sole purpose of securing petitioner's commitment to the project and not for any other purpose; and that it was their practice to take guarantee to ensure commitment of technocrat entrepreneurs like the writ petitioner to the project. Right from the beginning both the banks fully knew that it would be impossible for the writ petitioner, in his individual capacity, to pay the alleged huge amount of Rs. 292 lakhs, in case LPL fails to do so, which also explains why at one point R-3 waived requirement of his personal guarantee vide letter dated 09.08.1984-Ex.D-63 and at a later date sought his personal guarantee for the specific purpose of securing his commitment. Under those circumstances, the signatures were taken on blank papers at the instance of the banks, which is also evident from Exs.A-9 and A-10 produced by the banks before the Tribunal, which are at variance with one another. Petitioner never benefited from the loans taken by the LPL. Petitioner vide his letter dated 22.10.1998-Ex.D-64 handed over to the Official Liquidator among other things, the term deposits to a tune of Rs. 2,01,337/- lying in the name of LPL with UCO Bank. Further, the IDBI-the Operating Agency appointed by the BIFR, in a statement made before BIFR, as recorded in its proceedings dated 22.11.1991-Ex.D-56, stated that the sickness of the company is not as a result of managerial deficiencies but has been caused by extraneous reasons beyond the control of the promoters. Under Ex.D-40, a note prepared by IDBI, it is clearly stated that the company has an active and a broad based Board and there are no reports of any mismanagement. Petitioner also further explained to prove that the banks have obtained his signatures on blank papers to suite their convenience, which is evident from the various exhibits marked before the Tribunal. The very fact that the bank approached the BIFR for extension of period of limitation and filing of acknowledgment of debts for the same periods, clearly disclose that the banks pressed into service the blank documents on which the signatures of the petitioner were obtained to acknowledge the debt by the LPL as well as the writ petitioner. Clause 4 in regard to agreement in favour of R-2 in Ex.A-23, A-24, A-25, A-34, A-39 and A-44 and the para similar Clause 11 in regard to agreement in favour of R-3 in Exs. A-26 to A-29 cannot be enforced against the petitioner and they are unconstitutional and hit by Section 23 of the I.C. Act. The petitioner cannot waive the statutory right and the protection granted to him

under the provisions of Sections 134, 135, 139 and 145 of the I.C. Act in spite of agreeing for the said clause under the above general form of guarantees. The statements of accounts filed by R-2 bank Ex.A-91 to A-97 and by R-3 bank Ex.A-100 to A-105, are inadmissible in evidence as they are not in accordance with the relevant provisions of Banker's Books Evidence Act, 1991 (for short, "the Act"). All the loan transactions are inadmissible in evidence as the conditions laid down u/s 292(1)(c) Regulation of 84 of Table A of Schedule I of Companies Act have not been met with and have not been followed. Since R-3-bank tampered the statement of accounts particularly Ex.A-101 and A-102, the reverse entries will not match the figures and, therefore, they are inadmissible in evidence. The respondents-banks are guilty for not releasing the otherwise sanctioned working capital in time, which has been accepted by the Tribunal in rejecting the claim against the writ petitioner, but was not adverted to by the Appellate Tribunal in reversing the said finding.

7. In the grounds of the writ petition, it was urged that the Appellate Tribunal has set aside the order of the Tribunal without stating how the findings arrived by the Tribunal in O.A. are not valid and proper. Hence, the impugned order is liable to be set aside as the Appellate Tribunal proceeded on the assumption that the petitioner's case was only that of signing in blanks forms, while the argument of the petitioner is that the revival letters and the amount mentioned therein were made in such a manner to correlate with the Statement of Accounts. The Appellate Tribunal failed to note that the amounts mentioned in the revival letters were somehow made to appear in the statement of accounts by creating bogus credits. The Appellate Tribunal failed to note that R-2 and R-3 approached the BIFR, seeking suspension of the relevant provisions of the Limitation Act, stating that the loan documents and securities were valid only up to 17.05.1992 for the purpose of limitation, whereas the documents filed and relied upon by them before the Tribunal were dated 22.02.1990, in which event the documents will get time barred only on 21.02.1993 and that the dates have been manipulated by the respondent banks in Exs.A-61, A-62, A-69 and A-70 before filing the O.A. before the Tribunal. The finding recorded by the Appellate Tribunal that once the revival letters acknowledging the liability are filed, it is not necessary to file the statement of accounts and in spite of filing the application by the petitioner for production of statement of accounts before the Appellate Tribunal, the same was not produced by R-2 and R-3. The finding recorded by the Appellate Tribunal, that the petitioner cannot be discharged as surety in terms of Section 139 of I.C. Act is not correct and contrary to evidence on record. Hence, the order passed by the Appellate Tribunal is liable to be set aside.

8. R-2 and R-3 filed separate counters. R-2 in its counter stated that the sanction of credit facilities to R-4 company, for which the petitioner was the Managing Director through out the material point of time; availment of these facilities from R-2 and R-3; the stipulation of the banks that the petitioner shall give personal guarantee for credit limits and the amounts due and payable in the loan accounts of R-4; are within the knowledge of the petitioner and are not disputed by him.

Further, the petitioner admitted the guarantee agreements relied on by the banks, bears his signatures and pleaded that he signed on these documents, when they were blank and later on the documents were filled, and consequently they are not enforceable. When admittedly the credit limits to R-4 were sanctioned by the banks inter alia stipulated that the writ petitioner who is the Managing Director of the R-4 shall stand as a guarantor in his personal capacity for the said amounts and the bank made claim against him only for those amounts, the writ petitioner, who signed on behalf of LPL, cannot escape from the liability as guarantor as the contents in those documents are in consonance with the terms and conditions agreed between the parties. At no point of time, till the written statement was filed in the O.A., the petitioner raised any grievance in regard to the personal guarantee given by him for the loan accounts of R-4. The guarantee documents manifestly evident that it is a continuing guarantee and as such the period of limitation to initiate legal proceedings for recovery of the amount under the guarantees does not start from the date of document, but it commences only from the date on which the demand was made on the guarantor and when he fails to honor the guarantee. The demand notice was served on the petitioner on 11.11.1997 (Ex.A-87) and the O.A. was filed on 29.07.1998. Therefore, the claim against the petitioner as a guarantor was within the period of limitation. The petitioner having full knowledge about the credit limits sanctioned by R-2 and R-3 and availed by R-4 and that the petitioner being the Managing Director of R-4 company and also having executed the documents in relation thereto, cannot plead ignorance nor can dishonour his liability. Petitioner if had any grievance about the extent of liability in the loan account of R-4, though the respondent company was ordered to be wound up and the Official Liquidator represented the company in O.A. proceedings, he could have questioned the extent of liability of borrower in those proceedings, but never made any attempt in that direction. The present plea taken by the writ petitioner is only to avoid his liability to R-2 and R-3 banks as a guarantor by raising false and untenable allegations. It is denied that he signed the papers at the instance of bankers in order to secure immediate and early release of credit facilities for production and operation of R-4 company. Even if it is assumed for the sake of argument that the documents which were signed by the writ petitioner in the capacity as a guarantor were not duly filled at the time of his signature, unless he pleads and proves that as per the terms of the contract, i.e., the terms and conditions on which the credit facilities were extended to R-4 are not the same, there is no need for the bank to prove and establish these documents. Once the signature on those documents are admitted, the burden lies on the petitioner to prove and establish that those documents were not duly filled and further, the material contents in the documents were not reflecting the terms and conditions agreed between them. In the O.A., the claim has been proved and the Tribunal passed an order for the amount against R-4 company who was the borrower and the claim against the petitioner as a guarantor was rejected for impertinent reasons and contrary to the evidence available on record. The Appellate Tribunal categorically held that the documents were duly executed in respect of his

liability as a guarantor and the claim against him was within the period of limitation and rejected all the contentions. Petitioner having waived the rights available to the guarantor under Sections 133, 134, 138, 139 and 141 of the I.C. Act, as the terms and conditions of the guarantee are binding on him, he estopped from contending that the clauses of guarantee are contrary to the above provisions. The Official Liquidator sold the assets of R-4 company after obtaining permission from the Company Court and after the sale was confirmed by the Company Court only, he handed over the assets. The bankers have no duty to inform the petitioner, as he was a guarantor. If really those assets could have fetched more price than the amount realized on sale of the property, petitioner could have raised an objection before the Company Court and could have approached the intending purchasers for higher price at the time of auction. He being the Managing Director cannot plead that he has no knowledge about the sale of company's assets for a lesser price. The liability of R-4 company was not in dispute, as these liabilities are shown before the BIFR proceedings as the reference was registered under the Sick Industries (Companies) Act, 1986 to which it was a party being a secured creditor and the writ petitioner only represented R-4 company in all those proceedings as a Managing Director until the Company Court passed the winding up orders pursuant to the opinion given by the BIFR that it is not viable. There is no merit in the contention of the learned Counsel for the petitioner that the transactions and the documents executed in relation thereto are not in consonance with Section 292(1)(c) and no liability can be fastened on the petitioner. Admittedly, the credit facilities have been availed by R-4 company from both the banks, which were reflected in the annual balance sheet submitted by R-4 company, duly signed by the writ petitioner. Once the documents, which are filed before the Tribunal, were duly stamped as required under law and marked and proved, it is not open for the petitioner to plead that the said documents are not duly stamped. The Tribunal cannot go into the fact that the banks are guilty in not releasing the working capital limits in time, since the proceedings were conducted by the BIFR and the report submitted by it for winding up of R-4 company cannot be rehabilitated, it was forwarded to the Company Court for further orders and prayed for dismissal of the writ petition.

9. R-3 bank also filed a counter contending that once the writ petitioner signed on the proforma documents and admitted about his affixing the signatures, he is bound by the printed terms and conditions referred therein i.e., Exs. A-34 and A-39. The guarantees executed by the petitioners were continuing guarantees and still subsist. As long as the liability of the principal borrower subsists the guarantor can be sued during the extended period. The statement of accounts duly certified by the Manager is admissible in evidence under the Bankers Book Evidence Act and the same was supported by the evidence of A.Ws.1 and 2., which prima facie prove the claim of R-2 and R-3. The period when the reference was made to BIFR and till the date the matter was promptly disposed of by AAIFR by operation of Section 22(6) of the Sick Industrial Companies (Special

Provisions) Act (for brevity, "SICA"), 1985. Therefore, the application filed by the bank is well within the period of limitation and prayed for dismissal of the writ petition.

10. Sri V.T.M. Prasad, learned Counsel for the petitioner submitted that non-filing of the statement of accounts was pleaded at the earliest point of time, apart from filing I.A. No. 89 of 2002 for production of the account copy, which were not filed earlier and also filed I.A. No. 1013 of 2004 to strike out paras 5(a) to (z) and 6 of the Plaint in O.A. No. 1652 of 1999 for non production of statement of accounts and in all there are 5 I. As filed and hence, the finding of the Appellate Tribunal that the petitioner at the earliest not called for the statement of accounts, is not correct in view of filing I.A. No. 89 of 2002. Since there is no complaint of mismanagement by the BIFR or by the Tribunal, the finding given by the Appellate Tribunal that there was a mismanagement is erroneous. Further, no finding has been recorded by the Appellate Tribunal for not providing the working capital by the R-2 and R-3-banks. Once the unit was under sale and under Ex.D-58 the registered valuers valued at Rs. 9.23,91,000/-, and when respondent No. 4 and the bankers allowed the valuable security for sale at a lesser price, the petitioner is discharged from his liability. The petitioner deliberately took a strategy to surprise the respondent banks -applicants in O.A., disclosing signatures on blank paper in the cross-examination of the petitioner, then the whole burden shifts on R-2 and R-3-banks to prove that they have not obtained the signatures on the blank papers. For the said proposition reliance is placed on *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another*, and *Union of India (UOI) Vs. Moksh Builders and Financiers Ltd. and Others*, He summarised his arguments contending that there is a falsification of the accounts by the Canara Bank, which is evident from Ex.A-72, A-101, A-78. The loan transactions of R-2 and R-3 with R-4 are not in compliance with Section 292(1) (c) of the Indian Companies Act and no finding has been recorded by the Appellate Tribunal on the said aspect. There is no mismanagement of the company as held by the BIFR and the company died due to the lack of working capital. The statement of accounts furnished by the banks are not in accordance with the Bankers Book Evidence Act, as the name of the Manager who certified the same to be true copies have not been mentioned therein. All the documents which were signed by the petitioner are blank papers, which is evident from the documents filed along with the O.A. and produced during the course of examination. The finding of the DRAT based on Ex.A-68, A-106 and A-107 is erroneous, since Ex.A-68 is only a balance sheet signed by the auditor acknowledging the liability, the same cannot be used against the petitioner.

In support of the contentions advanced by the learned Counsel for the petitioner, reliance is placed on *Nazir Ahmad v. King Emperor* (3) AIR 1936 Privy Council 253 (2) and *Babu Verghese and Others Vs. Bar Council of Kerala and Others*,

11. Sri A.Krishnam Raju, learned Counsel for R-2-bank while refuting the submissions contended that the petitioner was the Managing Director from the

date of incorporation of R-4 company and the Recovery Certificate was obtained against R-4 company, on Exs.A-23, A-24, A-25, A-34, A-39 and A-44 guarantees were given by the writ petitioner, the Tribunal has not given any finding that the signatures were obtained on blank documents. Nowhere in the written statement, the petitioner pleaded that he signed on the blank documents and there is no dispute about his signing the said documents as pleaded by him in para 19 of page 110 of reply in the O.A. Whereas the petitioner in para 19 of his reply statement admitted that the Canara Bank filed four guarantees executed by the petitioner. For each guarantee form there is a printed covering letter, it is pleaded that in the second guarantee covering letter dated 07.04.1986 only, the 2nd para in the covering letter has been struck off and signed by him. In regard to the 3rd guarantee covering letter though the 2nd para has been struck off, it has not been struck off under his signature as required by the note and some one else has done it subsequently. But he has not denied about the execution of the guarantees. The Funded Interest Term Loan-I itself shows that the term loan is already availed by the borrower and he is not able to repay the interest debited to his account are to be charged after analysing the cash flow to facilitate repayment converted to Funded Interest Term Loan-1. Likewise, Ex.A-23 the general form of guarantee dated 30.03.1988, is a continuing guarantee and shall not be considered as wholly or partly satisfied and the said clauses 3 and 4 do not oppose to public policy, where the petitioner agreed that he is not entitled to any of the rights conferred on sureties by Sections 133, 134, 135, 139 and 141 of the I.C. Act, which are not opposed to public policy as held by the Bombay High Court in Mukesh Gupta Vs. Sicom Ltd., and Karnataka High Court in T. Raju Setty Vs. Bank of Baroda, and hence, the petitioner cannot plead discharge. Once the sale of the property was confirmed by the Company Court, on reference made by the BIFR to the Court, in R.C.C. No. 6 of 1993 and the petitioner represented R-4 company as a Managing Director, he cannot plead discharge. For the said proposition reliance is placed on Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, Once Clause-3 of the guarantees under Ex.A-23, A-24, A-25, A-34, A-39 and A-44 clearly envisages that they are a continuing guarantees, the claim is not barred by limitation and the limitation starts from the date of demand or refusal to comply the terms. For the said proposition reliance is placed on Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd., Clause 3 of the guarantee clearly envisages it is a continuing guarantee and the 2nd respondent bank issued a notice under Ex.A-87 on 11.11.1997 and the O.A. was filed on 29.7.1998, which is well within limitation and since the petitioner failed to honour the demand nor any reply is sent denying the execution of the guarantees, or claiming that execution is on the blank forms, the suit is well within the limitation as per Article 155 of the Limitation Act and for the said proposition reliance is placed on Margaret Lalita's case (8 supra).

12. Sri Deepak Bhattacharjee, learned Counsel for R-3-Bank while adopting the above submissions made by Sri A.Krishnam Raju, learned Counsel for R-2-bank

contended that Exs.A-26 to A-29 are the covering letters along with guarantees Exs.A-26 to A-29 respectively, and Exs.A-101 and A-102 statement of accounts have been certified by the Manager of the Canara Bank. The interest, which was calculated and added to the account, was subsequently deleted as it is a non-performing asset. Since the petitioner under Ex.A68-balance sheet of R-4 company, acknowledged the liability, as a Managing Director, he cannot plead that he has not acknowledged the debt. As per Exs.A-70 to A-75 once the liability of the principal borrower is subsisting on the date of filing of the O.A., it also enlarges the liability of the guarantor as per the continuing guarantee given by the petitioner. Mere non-mentioning of the name of the Manager, who certified the ledger account is only a procedural irregularity, but will not invalidate the document once it is signed by the competent person certifying it is a ledger account in true copy to the ledger maintained by the bank. For the said proposition, reliance is placed on *United Industrial Bank Ltd. Vs. G.C. Dey, Calcutta 151*, *Deepak Kumar and Ors. v. State Bank of India* (10) (1996) BC 476 , and *State Bank of India Vs. Yumnam Gouramani Singh*, Bank filing application for extension of limitation on the premise Section 22 of the SICA will not govern personal guarantee, but in view of the law declared by the Hon''ble Supreme Court in *Margaret Lalita's case* (8 supra) that there is no necessary for filing of such application. Therefore, it cannot be presumed that the suit is barred by limitation on mere filing of application before the BIFR. The petitioner who is none other than the Managing Director of R-4 company cannot plead that his signatures are obtained on blank papers, when the continuing bank guarantee given by him is in consonance with the terms and conditions of the loan documents of the principal borrower. For the said proposition reliance is placed on *Bihar State Electricity Board, Patna and Others Vs. Green Rubber Industries and Others*, , *Achuthan Pillai Vs. Marikar (Motors) Ltd., Trivandrum and Others*, , *Ranchhodbhai Somabhai and Another Vs. Babubhai Bhailalbai and Others*, , *Anil Rishi Vs. Gurbaksh Singh*, , *Kumar Krishna Rohatgi v. State Bank of India* (16) 1980 50 Comp Cas722 . Once the petitioner admitted the signature on the guarantee Ex.A-26 to A-29 it is for him to establish that he signed on the blank documents. When A.Ws. 1 and 2 are in the witness box, no suggestion was made by the petitioner to shift the onus on the bank. The liability of the petitioner is co extensive with that of the principal borrower. For the said proposition reliance is placed on *Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjunwala*, . Non-mentioning of authorized officers" name is only a hyper technical one, since the bank is dealing with public finances, public interest demands its claim cannot be rejected on hyper technical grounds. For the said proposition reliance is placed on *Radheshyam G. Garg Vs. Safiyabai Ibrahim Lightwalla*, , *United Bank of India v. Naresh Kumar* (19) AIR 1997 SC 3 and *State Bank of India v. Yumnam Gouramani Singh* (11 supra).

13. From the above submissions, the points that arise for consideration in this writ petition are

1. Whether the clauses in the continuing agreements, waiving the rights of the

petitioner under Sections 133, 134, 135, 139 & 141 of the I.C. Act are void and hit by Section 23 of the I.C. Act and all the documents including the continuing guarantees were signed on the blank papers as pleaded by the petitioner? If so, no liability can be fastened on the petitioner basing upon the above guarantees.

2. Whether the petitioner can plead discharge from his liability on the ground that the assets of the R-4 were sold by the Official Liquidator for a lesser price than valued by the valuer?

3. Whether the statement of accounts, produced by R-2 & R-3-banks are not admissible in evidence under the Bankers Book Evidence Act or not and the finding of the Appellate Tribunal in modifying the decree by placing reliance on Exs.A-68, A-106 and A-107, which are not admissible in evidence under the Bankers Book Evidence Act, is erroneous?

4. Whether the claim made in the O.A. was barred by limitation or not?

Point No. 1:

14. Petitioner has not disputed about the signatures on Exs.A-23 to A-29, which are continuing guarantees wherein it is admitted that he is not entitled to any of the rights conferred on sureties by Sections 133, 134, 135, 139 & 141 of the I.C. Act and agreed that the guarantees shall be continuing, binding the petitioner or his personal representative, until its expiration and will cease only on payment of the amounts borrowed by the petitioner-guarantor or by the principal borrower. In reply to the O.A. before the Tribunal, petitioner has not pleaded about his signing the blank guarantee forms, but asserted in para 19 of his reply that R-3 filed four guarantees alleged to be executed by R-4 and the petitioner and each guarantee is covered by a covering letter, which are referred to as 1st, 2nd, 3rd and 4th guarantee covering letters. In para 19(a)(ii), it is pleaded that the "note" in every guarantee covering letter is as follows "second para of this letter to be struck off under the signature of the guarantor/s if it is not an additional guarantee". The second para has been struck off and signed by him only on the 2nd guarantee covering letter dated 07.04.1986. In regard to 3rd guarantee covering letter though the 2nd para has been struck off, it has not been struck off under his signature as required by the above "Note". This defendant has not struck off the 2nd para and some one has done it subsequently. In four guarantee covering letters or for the said four guarantees there are no words to the effect that the later guarantee supersedes the former or the preceding guarantee. So, the 2nd guarantee dated 07.04.1986, is a separate one by itself, because the word "this is an addition to the guarantee already executed by him/ them in this behalf and held by you" have been struck off. Likewise, the total amount of the four guarantees (Rs. 107.50 lakhs + 117.50 lakhs + 125 lakhs + 146 lakhs) adds upto Rs. 496 lakhs. These guarantees are invalid for the reason that they do not reflect the consideration amount or the amount in the statement of accounts. These four personal guarantees produced by the Canara Bank cannot fasten the liability on him and unenforceable and are hit by the provisions

of Section 139 of the I.C. Act. There is a variance between the said four personal guarantees and the statement of accounts furnished by the Canara Bank and for the said reason he is not liable under them. Similarly, in para 17 it is pleaded that the personal guarantees produced by Andhra Bank, executed after the Board resolution dated 20.12.1988, are in no way connected to nor can be correlated to the various fund and non-fund amounts mentioned in the said resolution. Therefore, there are no legs to stand, but it was nowhere pleaded that the blank signed forms were utilized for the purpose of creating continuing guarantees by the banks. Even in the affidavit filed in support of the writ petition, in para 4 it was pleaded that the bank insisted on a personal guarantee to be executed by the petitioner, explaining that the personal guarantees were required for the sole purpose of securing his commitment to the project and not for any other purpose. When the said documents were marked through A.W.1 and A.W.2, no suggestion was made to the witnesses of the bank by the petitioner about signing of the blank papers, which were subsequently used as personal guarantees, nor in the affidavit filed in lieu of the chief examination of the petitioner as D.W.2. But he has stated about signing of the blank papers for the first time, only in the cross-examination. It is no doubt fairly well settled that the oral evidence is worthless and is of no value for determining whether the admissions contained in certain documents are wrong in the absence of pleadings and issues. {See Central Bank of India v. H.P. Jalan AIR 1972 SC 1274}

15. The Supreme Court in Bihar State Electricity Board (12 supra) categorically held that once the signature on the admitted documents contains printed contractual terms, onus of proof lies on the person to establish that he signed the blank document. Therefore, in the absence of any plea to the said effect in the reply statement in the O.A. and having admitted execution, pleaded that they are hit by Section 139 of I.C. Act, cannot be enforced, or putting any suggestion to A.W.1 and A.W.2, the petitioner cannot plead the same in the cross-examination or cannot put forth any argument to the said effect.

In Raju Setty (6 supra), a Division Bench of Karnataka High Court while interpreting general form of guarantee where the executant/surety agreed that he is not entitled to any of the rights conferred on sureties by Sections 133, 134, 135, 139 & 141 of the I.C. Act which are not opposed to public policy held that the rights available to the surety under Chapter VIII of the I.C. Act, can be waived by the surety, such waiving of right by the surety is neither intended to defeat nor does it defeat any provisions of law. The view taken by the Karnataka High Court in Raju Setty (6 supra), has been followed by the Bombay High Court in Mukesh Gupta (5 supra).

16. In view of the same, the contention made by the learned Counsel for the petitioner that the petitioner deliberately adopted a strategy to spring a surprise to the banks disclosing the signatures on blank papers in the cross-examination, is a fallacy and cannot be accepted. Point No. 1 is answered accordingly.

Point No. 2:

17. It is not disputed that R-4 company is promoted in the joint sector along with the petitioner and APIDC, IDBI, ICICI. The same was referred to BIFR and it referred the matter to the Company Court with a finding that R-4 company-LPL has become sick industrial unit within the meaning of Section 3(1)(o) of SICA. In order to protect the financial and other interests of the company, the Company Court appointed Sri G.V. Chalapati Rao as Special Director on the board of company. Later R-4 company was sold by the Official Liquidator for a sum of Rs. 1.75 crores, as against Rs. 9.239 crores valued by the valuer. Therefore, he is discharged from the liability in view of Section 139 of the I.C. Act.

Section 139 of the I.C. Act reads as under:

Section 139 - Discharge of surety by creditor's act or omission impairing surety's eventual remedy:

If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

The Appellate Tribunal rightly interpreted the provision which clearly indicates that R-2 and R-3 banks being creditors cannot be said to have committed any act which is inconsistent with the rights of the writ petitioner as surety for the loan availed by R-4 company and the same was well within the knowledge of the petitioner, who was a party and who appeared on behalf of R-4 company before the BIFR and also before the AAIFR and the same was referred to the Company Court by the BIFR and on such references, he represented R-4 company before this Court, till the Official Liquidator is appointed to take possession of the properties of R-4 company under liquidation. In view of the same, he being the guarantor of the loan availed by R-4 company, it is for him to participate in the proceedings, objecting the sale of the properties for a lesser price than valued by the valuer. Since it is not the creditor who acted inconsistent with the right of the surety, or omitted to do any act, which the banks has a duty to the surety, the contention of the learned Counsel for the petitioner that the surety can plead discharge, cannot be accepted.

18. Further, as per Clause 3 the continuing guarantees executed by him under Exs.A-23 to A-29, he agreed that his guarantee shall continue in force notwithstanding the discharge of the principal by operation of law or his death or the death of any one of them and shall seize only on payment of the amount guaranteed under the continuing guarantee. Therefore, the contention that the petitioner was not made a party in his personal capacity by the banks or other financial institutions such as IDBI, IFCI or before the Hon'ble High Court in winding up proceedings of R-4 company, is devoid of merits, as he represented the company as a Managing Director and participated in the enquiry. Point No. 2 is answered accordingly.

Point No. 3:

19. Learned Counsel for the petitioner strongly contends that as per the definition of certified copy as defined u/s 2(8) of the Act, the certified copy prepared should be certified to the said effect with date and subscribed by the principal accountant or manager of the bank with his name and official title. All the documents i.e., Exs.A-91 to A-97 and Exs.A-100 to A-105-Statement of accounts, have not been certified in the manner prescribed under the Act, namely the name of the officer who issued the certificate has not been mentioned in any of the documents and, therefore, they are inadmissible in evidence.

20. Learned Counsel for the 3rd respondent-bank contended that non mentioning of the name of the manager who certified the ledger account is not fatal to the case, when once it was signed on the official slip.

21. A learned Single Judge of Calcutta High Court in United Industrial Bank Ltd., (9 supra) held that once an officer of the bank has produced a statement of the defendant's account with the bank duly certified by the branch manager under the Bankers' Book Evidence Act and deposed to the correctness of the said statement, then the plaintiff claim has to be succeeded.

22. A learned Single Judge of Madhya Pradesh High Court in Deepak Kumar and Ors. (10 supra) held that Section 4 of the Bankers' Book Evidence Act, 1891 lays down that the certified copy of any entry in the Bankers book, shall in all proceeding be received as a prima facie evidence of the existence of such entry and shall be admitted in evidence of the matters, transactions and accounts therein recorded in every case. Therefore, entries of books of accounts filed by the respondent/Bank in support of the claim was a prima facie evidence of the existence of such entry and it was not required to be proved by any oral evidence.

23. The Supreme court in State Bank of India (11 supra) held that once the Entries in the books of account is corroborated by the branch manager and other bank officials, which were not prepared by the witness P.W. 7, that apart from the entries of the books of account, when the evidence on record corroborate the said entries and once the defendant admitted that he took the alleged loans from the bank, it amounts to sufficient proof of the loan transaction.

24. From the evidence on record, though the above statements of accounts were signed by the manger to be certified copy, only his name has not been mentioned therein. When the writ petitioner submitted the balance sheet under Ex. A-68 on behalf of R-4 company, acknowledging the loan liability in the balance sheet signed by him as a director, it is sufficient that he acknowledged a debt as reflected in the statement of accounts. In view of the same, the finding recorded by the Appellate Tribunal that as per Ex.A-68, A-106 and A-107, the petitioner as guarantor and in his capacity as Managing Director signed the annual balance sheets confirmed not only the liabilities of the company, but also the guarantees given by him for the limits availed by the company as a borrower,

does not suffer from any manifest illegality, warranting interference.

25. In view of the same, we reject the contention that the petitioner cannot be fastened the liability on the ledger accounts, which are not certified copies of the document and cannot be received in evidence. Point No. 3 is answered accordingly.

Point No. 4:

26. In point No. 1 it was held that the petitioner executed the continuing guarantees Ex.A-23 to A-29. Mere filing of application by bank before the BIFR for extension of the period of limitation u/s 22(3) read with Section 22(5) of SICA, under Exs.D-5 and D-6 as an abundant caution and on BIFR further extending the limitation, cannot lead to the conclusion that the suit claim is barred by limitation, as contended by the petitioner.

27. As held by the Supreme Court in *Mrs. Margaret Lalita Samuel* (8 *supra*) the petitioner has to pay the due to the respondents-banks on the demand made by the bank in Ex.A-87 dated 11.11.1997, wherein it was held that in case of a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced, and the limitation would only run from the date of breach under Article 115 of the Schedule to the Limitation Act, 1908 corresponding to Article 55 of the Limitation Act, 1963. The Supreme Court, after approving the ratio laid down in the said aspect by the Bombay High Court, observed this guarantee shall be a continuing guarantee and shall apply to the balance that it is now or may at any time hereafter be owing to you by the William Nosworthy and Roberty Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid.

28. Further, it is not disputed that the bank issued a notice under Ex.A-87 dated 11.11.1987 calling upon the principal borrower R-4 and the petitioner to discharge the liability under the notice, to which no reply has been given by the petitioner denying the execution of the continuing guarantee nor disputed about its execution stating that the signature was obtained on the blank forms as contended now. In view of the same, the O.A., which is filed on 29.07.1998, is well within the period of limitation and is not barred by limitation. The Appellate Tribunal rightly held on the said point that the suit claim of the respondent bank is not barred by limitation. Point No. 4 is answered accordingly.

29. The other contentions urged by the learned Counsel for the petitioner that the findings arrived by the Appellate Tribunal is erroneous, contrary to the record, etc., cannot be gone into and the arguments advanced on the findings recorded, do not merit consideration for the reason, in exercising the certiorari jurisdiction under Article 226 of the Constitution of India, this Court is not entitled to act as an Appellate court to re-appreciate the entire evidence.

30. It is well settled that writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. The finding of fact reached by the Court or the Tribunal as a result of appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. But, however, in regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal has erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, the Court must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding [see Syed Yakoob Vs. K.S. Radhakrishnan and Others,

31. In view of the conclusions reached by us in points 1 to 4, no infirmity is discernable with the order passed by the Appellate Tribunal, warranting interference.

32. Writ petition fails and is accordingly dismissed. No order as to costs.