
(2003) 11 DEL CK 0037

In the Delhi High Court

Case No : S 2390 of 2001

National Horticulture Board

APPELLANT

Vs

Flora Continental Ltd. and Others

RESPONDENT

Date of Decision : 03-11-2003

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

Citation : (2004) 1 AD 81 : (2004) 2 BC 356 : (2003) 108 DLT 228

Hon'ble Judges : Mahmood Ali Khan, J

Bench : Single Bench

Advocate : Manoj, for the Appellant; M. Dutta, for the Respondent

Judgement

Mahmood Ali Khan, J.—is Nos.10893/01 and 3019/02

2. The defendants No. 1 to 5 are seeking leave to defend the civil suit filed by the plaintiff for recovery of Rs. 1, 37, 48, 509 under Order 37 CPC.

3. The plaintiff is a society registered under the Societies Act formed by the Government of India, Ministry of Agriculture, inter alia, for the purpose of promoting, developing and supporting horticulture activities by rendering financial assistance to various institutions engaged in horticulture activities including processing of fruits and vegetables and floriculture. The defendant No. 1 is a company incorporated under the Companies Act. On 1.3.1995 it had applied to the plaintiff for financial assistance by way of soft loan to finance setting up its 100% export oriented project on floriculture, fruits and vegetables. The plaintiff conveyed its acceptance to the request by letter dated 30.11.1995 and agreed to advance a term loan of Rs. 1 crore to finance the defendant's No. 1 project. The terms and conditions of the loan were contained in sanction letter dated 30.11.1995 and the loan agreement dated 7.12.1995. These were duly accepted by the defendant No. 1. Defendants No. 2 to 5 executed personal guarantee to the due payment of the amount of loan recoverable from the defendant No. 1. The plaintiff accordingly disbursed a sum of Rs. 90 lakhs out of

the sanctioned loan of Rs. 1 crore between 28.12.1995 and 2.2.1996. As per loan agreement dated 7.12.1995 the loan was repayable in five equal yearly installments of Rs. 20 lakhs each commencing from 30.11.1998. The defendant also agreed to pay service charges on the principal amount of the outstanding loan at the rate of 4% per annum. The defendant No. 1 also created by the loan agreement first charge by way of hypothecation in favor of the plaintiff on all their movable properties and further mortgaged its fixed assets and movable assets in favor of the plaintiff and the defendant No. 6 (Haryana State Industrial Development Corporation). The defendants had executed promissory note dated 7.12.1995 in the sum of Rs. 1 crore and defendants No. 2 to 5 had executed an undertaking dated 7.12.1995 undertaking not to sell, transfer, dispose of their present and future holding in the defendant company. The defendants failed to complete the project and also failed to repay the loan installment. It became liable to pay the principal sum as well as the service charges which had not been paid despite notice dated 16.10.2001. The defendant No. 1 also acknowledged its liability towards the amount due under the promissory note dated 7.12.1995 and further acknowledged its liability vide revival letter dated 9.11.1998 and 23.6.2001 which amounted to an admission of the liability towards the plaintiff. Defendants No. 2 to 5 also acknowledged and confirmed their liability to make the payment of the outstanding loan against the defendant No. 1 under the loan agreement and the personal guarantees vide revival letter dated 9.11.1998 and 23.6.2001. The notice was served on the defendants No. 1 to 5 for paying a sum of Rs. 1, 37, 48, 509 but in vain. These defendants have become liable to pay interest at the rate of 18% per annum on the aforesaid amount pendentilite and future. The defendant No. 1 was having its registered office at 28, Pushpanjali, Delhi and also carried on part of its business in Delhi so this court has territorial jurisdiction to try the suit. Moreover part of the cause of action had accrued in Delhi. The plaintiff prayed for a decree for recovery of Rs. 1, 37, 48, 509 against the defendants No. 1 to 5 jointly and severally; pendentilite and future interest on the afore mentioned sum at the rate of 18% per annum till the date of realisation; service charges at the rate of 4% per annum pendentilite and future interest till the date of realisation; a decree for sale of mortgaged/hypothecated properties of the defendant No. 1 company; a decree of sale hypothecated plant, machineries and stocks of the defendant No. 1 company.

4. The summons for appearance were served and the defendants entered appearance. Thereafter, summons for judgment were served on the defendants which led to the filing of the present application for leave to defend the suit. In the application the defendants first narrated as to how the project for setting up a 100% export oriented floriculture unit was conceived which had tremendous potential and prospect of huge profits. It was alleged that the estimated cost of the project was Rs. 987 crores out of which Rs. 247 lakhs was to be provided by the promoters as their contribution, a sum of Rs. 200 lakhs were to be advanced by Haryana State Industrial Development Corporation (defendant No. 6) as a term loan, Rs. 1 crore was to be provided by the plaintiff as a soft loan and the

balance of Rs. 440 crores was to be raised by public issue. The plaintiff and the defendant No. 6 sanctioned the loan of Rs. 1 crore and 2 crores in December, 1995 and in May, 1995 respectively. The defendants imported green houses and other machineries but the defendant No. 6 disbursed only Rs. 1 crore while the plaintiff disbursed only Rs. 90 lakhs out of the sanctioned loan. They refused to disburse the balance till the public issue was made. Securities Exchange Board of India however by letter dated 6.6.1996 opined that floriculture was not a manufacturing activity as it would not make public issue. The defendants approached the defendant No. 6 and the plaintiff for release of the balance amount of loan. Both the plaintiff and the defendant No. 6 reappraised the project and found it viable. The defendant No. 6 declined to release the undisbursed loan of Rs. 1 crore but expressed willingness to release its charge over Kishora Kundli Land measuring 10 acres to enable defendants applicants No. 1 to 5 to sell it and raise money for the project but the charge was not released and two years were wasted in persuading them to do so. In the meantime expensive material, equipment and machinery and also green houses which were imported remained idle and unused. The defendants applicants had also invested a sum of Rs. 530 lakhs in the project. The defendants applicants then approached Government agencies to intervene. Agriculture and Processed Food Products Export Development Authority by letter dated 8.9.1997 requested Haryana State Industrial Development Corporation to release the balance amount of loan. Its Chairman again by letter dated 6.10.1997 pleaded both defendant No. 6 and the plaintiff for releasing the balance amount of loan. The said authority again by letter dated 29.8.1997 made similar request or to release the charge over the land in Village Kishora but to no effect. Even the meetings convened at the behest of Government agencies failed to bear fruits and neither the balance amount of loan was disbursed by the plaintiff and the defendant No. 6 nor was the charge over Kishora land was released. Ultimately the plaintiff and the defendant No. 6 released their charge over the said land in February, 1998 but the defendants applicants could not sell the land as in the meantime the real estate prices depreciated. These defendants again approached the defendant No. 6 for releasing the balance Rs. 1 crore. Instead defendant No. 6 invoked Section 29 of the State Financial Corporation Act and sealed the project and took over its possession. It also called for payment of the amount due. The defendants deposited the sum of Rs. 7 lakhs and thereafter the defendant No. 6 agreed to restore the possession of the project but in the meantime substantial portion of the project site had been encroached upon by trespassers and a number of expensive material and equipment was either missing or stolen for which defendant No. 6 was responsible. Ultimately the possession of the project site was restored to the defendant applicants on 14.7.2000 and the defendants by letter dated 27.7.2000 informed the defendant No. 6 about the material and equipment which had been stolen or pilfered from the project site. Again from newspaper Dainik Bhaskar dated 14.8.2001 it was learnt that a notice was issued by the defendant No. 6 for sale of the collateral property at village Ranwar, District Karnal, Haryana. The defendants applicants filed a civil writ petition CWP

No. 12467/01 before the Punjab and Haryana High Court on 20.8.2001 which stayed the sale. The defendants applicants had also filed a civil suit for mandatory injunction and for restoration of their properties at the project site and in the alternative compensation in terms of the losses suffered in the Court of Civil Judge, Senior Division, Chandigarh which is still pending. The amount of Rs. 90 lakhs received from the plaintiff was to be utilised for opening a letter of comfort with the Bank of Baroda for Rs. 140 lakhs by which Rs. 30 lakhs was deposited by the defendants applicants and Rs. 1 crore was to be deposited by the plaintiff since the plaintiff failed to disburse Rs. 10 lakhs the bank filed an application before the Debt Recovery Tribunal for recovery of Rs. 17 lakhs against the defendants applicants saddling them with an unwarranted and unrequired liability of additional Rs. 7 lakhs. 95% of the work on the project had been completed but it is the acts and omission of the plaintiff and the defendant No. 6 that it could not be fully completed and supported. The defendants applicants have stated that the following triable issues have arisen in this case which are as under:-

- a) Whether the Haryana State Industrial Development Corporation and the plaintiff herein were within their rights to not disburse the sanctioned amounts?
- b) Whether the Haryana State Industrial Development Corporation and the plaintiff herein were within their rights to not disburse the sanctioned amounts, especially after they had themselves appraised the project reports?
- c) Whether and if the project was unviable, then why did the same start disbursement in the first place?
- d) Whether and if the project was unviable, then why did they not stop disbursement at the first stage itself, rather than in between when the defendants had already been led to a point of no return?
- e) Whether and if the plaintiff and the Haryana State Industrial Development Corporation could refuse to disburse the sanctioned amounts, and if so, would it then not attract the doctrines of promissory estoppel and legitimate expectations?
- f) Whether and if the plaintiff and the Haryana State Industrial Development Corporation are directly and solely responsible for the doom and failure of the respondents' project owing to their gross apathy, negligence, contractual breaches and failure to discharge their obligations?
- g) Whether and if the defendants are not entitled to be compensated for the losses and damages suffered by them owing to the failure of the plaintiff and Haryana State Industrial Development Corporation to honour their contractual and legal obligations?
- h) Whether on account of the aforesaid illegal acts and gross omissions and commissions of the plaintiff, the alleged personal guarantees stand discharged and no amounts are due or legally recoverable from any of the defendants?

5. According to the defendants applicants they are entitled to prefer counter claim and set up if the leave to contest the suit is granted. The defendants No. 2 to 5 have however contended in the application that the suit is barred by time. The documents which have been referred to for extension of time were forged and fabricated and further that this court does not have any territorial jurisdiction to try the suit, since the agreement was executed the loan was disbursed in the State of Haryana, at the time of filing of the suit the defendants applicants did not have any office and were not carrying on business or working for gain within the jurisdiction of this court. Moreover, it was alleged that the plaintiff is also seeking relief for sale of the mortgaged/hypothecated property which is beyond the scope of the suit filed under Order 37 CPC. It is accordingly prayed that the suit be dismissed or an unconditional leave to contest the suit may be granted in favor of the defendants No. 1 to 5.

6. In the reply to the application for the leave to defend the plaintiff repudiated the allegations made by the defendants No. 1 to 5. It also contended that it had already released 90% of the term loan and cannot be held responsible for non implementation of the project. The plaintiff was advised against releasing the charge over the landed property since the new project site at the leased land belonged to panchayat. It however, had offered to release the charge provided some other property was given as a collateral alternative security. It was denied that the project was completed up to 95% or that the defendants applicants had spent Rs. 530 lakhs over it. It was also repudiated that the claim of the plaintiff was barred by time or that the court had no territorial jurisdiction to try the suit. It was reiterated that the defendant No. 1 company was having its registered office at 28, Pushpanjali, Delhi and carried on part of its business in Delhi within the jurisdiction of this court.

7. At the hearing counsel for the defendants applicants has reiterated the case pleaded in the leave application and urged that the triable issues as framed in the application, reproduced above arise. It was also strenuously argued that the defendant No. 1 did not have its business office in Pushpanjali, Delhi or at any other place in Delhi when the suit was instituted and no part of cause of action had arisen in this case in Delhi. Therefore, this court had no territorial jurisdiction. The execution of the acknowledgment or revival letter relied upon by the plaintiff for extension of the limitation period were also denied. According to him the defendants would plead counter claim and set up in the written statement for the losses suffered on account of acts and omissions of the plaintiff in the written statement if the leave is granted. He placed strong reliance in support of his arguments on the judgment of the Supreme Court in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, ; *Santosh Kumar Vs. Bhai Mool Singh*, ; *The Tata Iron and Steel Co. Ltd. Vs. M/s. Shakti Bearings and another*, ; *Neeta Agarwal Vs. R.L. Gupta*, ; *Indian Biotech Co. (P) Ltd. Vs. The Assam State Co-operative Marketing and Consumers Federation Ltd.*, , *Nairs Arkimetals (P) Ltd. Vs. New Delhi Hotels Ltd.*, and *State of Bank of India Vs. O.P. Gupta and others*, .

8. Conversely the argument of the counsel for the plaintiff is that the loan was advanced in terms of the loan agreement executed by the defendant and out of Rs. 1 crore 90 lakhs were disbursed by the plaintiff to the defendants applicants for executing the project. The defendants defaulted in repaying the loan and the interest accrued thereon. The imputation made against the plaintiff in the leave applications were refuted. The charge was not released from the landed property for the reasons which have been mentioned in the reply to the leave application. In the leave application the only accusation against the plaintiff is that the charge on the landed property was not released. It was vehemently argued that the registered office of the defendant No. 1 was not Delhi and the plaintiff was not intimated about its shifting to outside Delhi. For all these reasons it was denied that the defendant is entitled to leave to defend.

9. Before considering the merit of the application for leave to defend it will be apt to discuss the law which governed the grant for leave to defend in a suit filed under Order 37 CPC. Though the counsel for the plaintiff has cited a number of case law but the Supreme Court has summarised all its previous pronouncements on this point in *Sunil Enterprises v. SBI Commercial & International Bank Ltd*, Volume IV (1998) SLT 793. The principles of law were summed up as under:-

"(a) If the defendant satisfies the court that he has a good defense to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense, although not a possibly good defense, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defense to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defense, or if the defense is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defense but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured."

10. In the backdrop of the proposition of law laid down by the Supreme Court above the facts of the present case now may be examined. Leave to defend is to be granted to the defendant if it has raised good defense to the claim in the suit. If a fair and bonafide and reasonable defense has been raised. A conditional leave may be granted if the defense raised may be deemed sufficient or may be

established at the trial but the condition "as to the time of trial or mode of trial" may be imposed and not "as to payment in the court or furnishing security." It is only in a case where the defendant has raised no defense or the defense raised is sham, illusory or bogus when the defendant is not entitled to be granted leave to defend. Where the defendant did not disclose a defense or defense was sham or illusory or bogus the court may still grant leave to protect its defense imposing condition "that the amount claimed should be paid into court or otherwise secured."

11. In the present case the defendants applicants did not deny that out of the soft loan of Rs. 1 crore sanctioned by the plaintiff Rs. 90 lakhs were disbursed to it. The defendants admitted execution of the loan agreement, the promissory note and agreement of guarantee. The defendants applicants, however, denied their liability to repay the amount with interest primarily on the ground that on account of non disbursement of the amount of Rs. 10 lakhs by the plaintiff, non release of the charge over the landed property for over 2 years the project could not be implemented causing immense loss to the defendant. In fact the ground alleged for non completion of the project were attributable to the acts and omissions on the part of the defendant No. 6 which had also sanctioned a term loan of Rs. 2 crores for this project but had released only a sum of Rs. 1 crore. The allegations in the application against the defendant No. 6 were that it failed to release the balance loan of Rs. 1 crore, failed to release the charge over the landed property hypothecated/mortgaged with it, for two years after the defendant No. 1 could not raise money by making issues of its equity. Further allegation against defendant No. 6 was that it initiated action u/s 29 of the State Financial Corporation Act and took over possession of the project site. After sometime that part of the payment was made but in the meantime it allowed the project site to be occupied by trespassers resulting in the loss of expensive machineries and equipment which caused huge loss to the defendant No. 1. It is not disputed by the defendants applicants that the defendant No. 1 had defaulted in making repayment of the loan amount in accordance with the terms and conditions of the loan agreement executed and the liability of the defendant No. 1 to 5 as guarantors of the outstanding loan. Whether defendant No. 6 is responsible for failure of the project is not a good and bonafide defense to the claim of the plaintiff in the suit. It can also not be said to be reasonable defense for which the defendants No. 1 to 5 could be granted leave to defend unconditionally. The triable issues which have been framed in the application and reproduced above in the order, are merely concerned with the defendant No. 6. A suit for recovery of possession has already been filed by the defendants applicants against defendant No. 6.

12. But in the instant application for leave to defend the applicants have also contended that this court has no territorial jurisdiction since the defendant No. 1 had already shifted its registered office from Pushpanjali, Delhi to the State of Haryana and at the time of the filing of the suit the defendant was neither carrying on business nor was working for gain within the jurisdiction of this court.

Admittedly the loan agreement, promissory note, the undertaking and other documents were executed by the defendants No. 1 to 5 in the State of Haryana. No part of the project was to be executed in Delhi. The argument advanced on behalf of the plaintiff is that no intimation of the shifting of the registered office from Delhi to Haryana was given to the plaintiff, Therefore, the defendants No. 1 to 5 have raised a bonafide defense which may be established by them at the trial.

13. The next crucial defense raised by the defendants No. 1 to 5 in their replication is that the suit is barred by time. They have denied the execution of the acknowledgment or revival letters which have been relied upon by the plaintiff for extension of the period of limitation. The execution of the revival letters and the acknowledgment is thus required to be proved by evidence at the trial. It is a reasonable defense which may be established by the defendants No. 1 to 5 at the trial. Yet another contention of the defendants applicants is that the suit is not maintainable under Order 37 since the plaintiff also claims the relief of sale of mortgaged/hypothecated property of the defendant. The summary procedure prescribed under Rule 2 of Order 37 CPC applies to the following classes of suits as per Rule 1 of Order 37. They are as under:-

a) suits upon bills of exchange, hundies and promissory notes;

b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising, -

(i)suits upon bills of exchange, hundies and promissory notes;

(ii)on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii)on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

14. The provision clearly spelt out that a suit for recovery of money by sale of the mortgaged/hypothecated property is not covered by Rule 2. The relief which has been claimed by the plaintiff in the suit has already been reproduced above, Therefore, the relief claimed by the plaintiff for a decree of sale of the hypothecated or mortgaged property cannot be tried summarily under Order 37 CPC. It is a good defense against the claim of the plaintiff.

15. It appears that the case of the defendant is covered by the proposition of law laid down in guidelines (a) and (b) of the judgment of the Supreme Court in Sunil Enterprises (Supra). Even otherwise as per the averments made in the plaint the loan advanced by the plaintiff is secured as a charge on the movable and immovable property and the defendants applicants has been created, Therefore, it is not a case where condition of deposit of money in the court or scrutinizing the money any any other manner may be passed.

16. But keeping the totality of the facts and circumstances of the case it will be

appropriate that the proceedings of the suit are expedited. Accordingly, the leave to defend the suit is granted to the defendants No. 1 to 5 unconditionally subject to the condition that the defendants No. 1 to 5 shall file their written statement within four weeks. The plaintiff shall file its replication thereto within two weeks thereafter. The parties shall file their original documents within four weeks from today and shall appear before the Joint Registrar on 12.12.2003 for their admission and denial. Thereafter, the case shall be listed before the court on 9.1.2004 for framing of the issues. Application stands disposed of.