(1997) 09 DEL CK 0020

In the Delhi High Court

Case No : Suit No. 872/80

State Bank of India APPELLANT

Vs

Shri Damaoder Nath and brother RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Citation : (1997) 09 DEL CK 0020

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : Ms. Ritu Bhalla, for the Appellant; Ms. Ginny Jetley, for the Respondent

Judgement

C.M. Nayar. J.

1. This is a suit filed by the plaintiff for recovery of Rs. 1,19,112.00 against the defendants with pendants lite and future interest.

2. The plaintiff is a Statutory Corporation and has been incorporated constituted and established by the State Bank of India Act, 1955 (Act, No. 23 or 1955) and has its Central officer at Bombay. It has local Head Offices at Bombay, Calcutta, Madras Delhi and other places. It also maintenance branches at various places including one Branch at Daryaganj. Shri Ashok Kumar Jain who is the Principal Officer and Branch Manager of the plaintiff is authorised to file the present suit and to sign and verify the plaint on behalf of the plaintiff under Statutory Regulation Nos.76 & 77 of the State Bank of India General Regulations, 1955 and the notification issued thereunder.

3. Defendant No.1 is the sole proprietor of M/s. Indian Clothing Company and was carrying on the business of manufacturing ready-made garments. Defendant No.2 is the guarantor and has also created equitable mortgage in favor of the plaintiff in respect of her immovable property mentioned in Schedule A of the plaint as collateral security for advance made by the plaintiff to defendant No.1.

4. It is alleged that defendant No.1. approached the plaintiff for the grant of Certain cash credit facilities and in consideration of the plaintiff granting to defendant no.1. cash credit facility known as "Cash Credit (Special Hypothecation) Facility" For Rs. 50,000/-:

(a) the Defendants executed in favor of the plaintiff an Agreement for Hypothecation and Guarantee dated 12th January 1978 agreeing to hypothecate to the plaintiff the whole of defendant no. 1''s stocks and further agreeing to pay interest at the rate of 2% below the State Bank of India Advance Rate with minimum 12% per annum;

(b) Defendants no. 1 also executed in favor of defendant no. 2 a Demand Promissory Note dated 12th January 1978 for Rs. 50,000/- with interest at the rate of 12% below the State Bank of India Advance Rate with minimum 12% per annum and defendant no. 2 endorsed the said Demand Promissory Note in favor of the plaintiff. The said Demand Promissory Note was delivered by the defendants to the plaintiff along with a D.P. Note Delivery Letter of date;

(c) Defendant no. 2 also executed in favor of the plaintiff an Agreement of Guaranteed dated 12th January 1978 for Rs. 50,000/- with interests, as stated in the Agreement for Hypothecation and Guarantee.

5. It is further alleged that defendant no. 1 started availing of the said facility by operating the said account on and from 12th January, 1978 and on that day defendant no. 2 delivered to and deposited with the plaintiff Title Deeds of her immovable property admeasuring 130 sq. yards. (28"x42") out of Khasra No. 512/208, situated at Village Moujpur, Illaqa Shadra, Delhi with Intention to create an equitable mortgage in favour, of the plaintiff as Collateral Security for the advances made by the plaintiff to defendant no. 1 as stated in Schedule ''A'' hereinunder.

6. Thereafter, in consideration of the plaintiff agreeing to grant to defendant no. 1 another Cash Credit Facility known as Cash Credit (Special) Contingency) Facility" for Rs. 5,000/-, defendant no. 1 executed a Demand Promissory Note for Rs. 5,000/- dated 23rd February" 1978 in favor of defendant no. 2 and defendant no. 2 endorsed the Demand Promissory Note in favor of the plaintiff. The said Demand Promissory Note was also delivered by the defendants along with a D.P.Note Delivery Letter dated 23rd February 1978, addressed to the plaintiff as a Collateral Security. In consideration of the plaintiff further granting to defendant no. 1, another Cash Credit Facility know as "Cash Credit (Bills) Facility" for Rs. 35,000/- the following documents were executed;

(a) On 16th March 1978 defendant no. 1 executed in favor of the plaintiff an Agreement for Overdraft to the extent of Rs. 35,000/- agreeing to pay interest at the rate of 2% below the State Bank of India Advance Rate and also agreeing to give as Security to the plaintiff on Demand, Promissory Note for the said amount.

(b) Defendant no. 2 executed in favor of the plaintiff an Agreement of Guarantee dated 16th March 1978 for Rs. 35,000/-;

(c) Defendant no.1 executed in favor of defendant no.2 a Demand Promissory Note dated 16th March 1978 for Rs.35,000/- and defendant no. 2 endorsed the said Demand Promissory Note in favor of the plaintiff. The said Demand Promissory Note, was delivered to the plaintiff Along with the Defendants letter un-dated.

7. On 27th October, 1978, there were due and payable by the defendants to the plaintiff the following amounts:

i) Cash Credit (Special) Hypothecation) Facility Rs. 53,169.18 ii) Cash Credit (Special Contingency) facility Rs. 5,381.51 iii) Cash Credit(Bills) facility Rs. 37,125.72 TOTAL: Rs. 95,676.41 Since the accounts had become irregular, the aforesaid accounts were closed down by the plaintiff by transferring the outstanding in the three accounts to what is known as Protested Bills Account. On January 2, 1979 the defendant signed, acknowledged and confirmed the dues which were transferred to the Protested Bills account. Certified copies, meaning copies of entries in the books of account of the plaintiff pertaining to the cash Credit facilities and of the protested bills Account together with Certificates written at the foot of such copies that they are true copies of such entries, that such entries and condition in the ordinary books of the plaintiff and are made in the usual and ordinary course of the business and that such books are still in the custody of the plaintiff are being filled herewith and marked as Annexures A, B, C, and D respectively as forming part of this plaint.

8. It is submitted that since the aforesaid accounts of defendant no. 1 became irregular, the plaintiff caused to be sent to the defendants a legal notice dated 24th May 1979 calling upon the defendants to repay the entire dues of the plaintiff. The defendants, however, failed to repay the dues.

9. According to the Banking practice, the plaintiff does not apply interest in the Protested Bills Account but is entitled to recover the agreed rate of interest on the balance due from time to time. The contractual rate of interest on and from 27.10.1978 became 12% the interest on the total outstanding in the Protested Bills Account of defendant no.1 from 27th October. 1978 till the date of filing of the suit viz. 10th November, 1980 comes to Rs. 23,435/67.Therefore, as on the date of filling of the present suit, there is due and payable by the defendants to the plaintiff by way of principal interest and other charges a sum of Rs. 1,19,112/08.

10. Written statement has been filed by defendant No.1 wherein the following pleas are taken in the preliminary objections:

"It may be stated that the alleged loan was given against an export bill. The export bill was covered by an Export Credit Guarantee of the Export Credit Guarantee Corporation and was ensured. As per the Insurance policy in the event of the export bill not being honoured, the said Guarantee Corporation would pay

90% of the bill amount. The plaintiff Bank took the policy from the Defendant No.1 and got the same assigned to Export Credit Guarantee Corporation. When the assignment was made, all the rights to lodge the claim were transferred to the plaintiff bank meaning thereby in the event of the export bill being dishonoured the bank was to lodge a claim on the Export Credit Guarantee Corporation and was to get the money of the said bill from them. It may also be stated that the policy having been taken away by the plaintiff bank from the defendant No.1 he could not lodge any claim under the policy. Unfortunately, the export bill was not honoured. The bank was Export Credit Guarantee Corporation who issued insurance cover for the said amount. It may be stated that had the plaintiff bank lodged the claim which the bank was under legal obligations bound to do, the Export Credit Guarantee Corporation would have paid the amount to the plaintiff Bank. However, he plaintiff Bank did not take any step in lodging the claim. Not only this but in order to get the payment, the defendant No.1 also went to New York as the bill was sent to the New York as the bill was sent to the New York Branch of the plaintiff Bank for payment. The defendant and No.1 also wanted to file a case against the customer in New York and for that purpose a letter from State Bank of India, New York Branch to the effect that the payment had been refused by the customer was also required. The New York branch of the State Bank of India refused to issue the required letter in spite of repeated persuasion by the defendant No.1. Not only this but the defendant No.1 through Darya Ganj Branch also repeated requested for the same."

Similar pleas were taken in the written statement of defendant No.2. Replication was filed by the plaintiff denying the allegation made in the written statement and reiterating the averments made in the plaint.

11. On the pleadings of the parties, the following issues were framed on July 19, 1985:

1. Has the suit been institute on behalf of the plaintiff bank by a duly authorised person and the plaintiff signed and verified by such person?

2. What are the amounts due to the plaintiff under each of the three accounts mentioned in the plaint and which the defendant No.1 had opened with the plaintiff-bank?

3. What is the effect of the dishonour of the export bill which the defendant No.1 unstressed to the plaintiff-Bank for clearance and which had been insured with Export Credit Guarantee Corporation?

4. Is the liability of defendant No.1 absolved under that export bill because of the said insurance?

5. To what extent is defendant No.2 liable?

6. Are defendants entitled to set off and should they not pay the court fee on the amount for which set off is claimed?

7. To what amount is the plaintiff entitled to ?

8. Is defendant entitled to any counter-claim?

9. Relief.

ISSUE NO.1

12. The suit was instituted by the plaintiff Bank on the basis of the plaint signed and verified by Shri Ashok Kumar Jain, the then Branch Manager of the State Bank of India who has been examined as PW4 in the suit. He has stated that from July, 1980 to February, 1982. He was posted as Branch Manager of Darya Ganj Branch of the plaintiff Bank and was duly authorised to file the suit and also to sign the plaint and engage the counsel. The Gazette Notification in this regard has been exhibited as PW 4/1. On the other hand the defendants have failed to adduce any material evidence to rebut the aforesaid documentary evidence filed on behalf of the plaintiff. Accordingly, I hold that the suit has been signed, verified and instituted by a duly authorised person and, as such issue No.1 is decided in favor of the plaintiff and against the defendants.

ISSUE NO.2

13. The amount as payable by the defendants have not been denied. Reference may be made to Exhibits P1, P3, P4 and P5 and the deposition of PW1 and PW3 as recorded on September 11, 1987 and September 14, 1987 respectively. Exhibits P1 and P2 are the Agreement of hypothecation and guarantee hypothecating the goods, machinery, book debts and other assets in favor of the plaintiff Bank by the defendants. Exhibits P-3 is the Demand Promissory Note dated January 12, 1978 for Rs.50,000/-. Exhibit P4 is the letter dated January 12, 1978 written to the Branch Manager, State Bank of India, Darya Ganj, New Delhi which reads as under:

"Please take delivery of the accompanying Demand Promissory Note dated 12.1.1978 for Rs. 50,000/- made by Indian Clothing Company in favor of Mrs. Sunita Devi and asked in favor of State Bank of India. We further request you to note that we dispense with a notice of dishonour in terms of Section 98(a) of the Negotiable Instrument Act, 1881 and that in the above event of payment not being made on demand the Bank is at liberty to give time for payment to either of us without discharging the other of us from liability.

Sd/-

for Indiana Clothing Company

Proprietor"

The details of the amounts have already been refereed to in the earlier part of this judgment. Reference may be made to the testimony of PW3 Mrs. Rangaranjan, Manager (Credits) State Bank of India which reads as under :

"From 1977 to February, 1979 I was posted as Branch Manager of the plaintiff

Bank in Darya Ganj Branch. I had the occasion to deal with the defendants at that time. the defendants were granted special hypothecated facility of Rs.50,000/- and bill facility of Rs.35,000/- and special contingency limit of Rs.5,000/-. It was in January, 1978. This was in connection with the exhibition of export orders. The defendants and in pursuance of the said agreement executed the documents. The documents were not blank at the time of execution. These documents were filled in at the time of execution. The same were filled in by the borrower Damodar Naik. I identify these documents as Ex. P.1, P.2, P.4, P.6, P.7, P.8, P.9, and P.10. Defendant No.2 had deposited her title deeds vide letter Ex.P.19 (The original is seen and returned). Ex.P.19 also bears my signatures.Ex.P.15 is from ''A'' which is filled in my handwriting and bears the signatures of Smt. Sumitra Devi. The title deeds in original is annexed to P-15."

It is submitted in the plaint that a sum of Rs. 53,169.18, Rs.5,381.51 and Rs.37,125/- were due on October 27, 1978 against the defendants against cash credit facility known as "Cash Credit (Special Hypothecation) Facility", "Cash Credit (Special Contingency) Facility" and "Cash Credit (Bills) Facility "respectively. Reference is made to Exhibits P.8 and P.9 which are the original Agreements duly executed and entered into between the parties and Exhibit P-10 is the Demand Promissory Note for Rs.35,000/-. the statements of account Exhibits P-20 to P-23 have been duly certified u/s 4 of the Bankers Book Evidence Act. Exhibits P.12 is the balance confirmation in respect of Cash Credit (Special Hypothecation) facility, Exhibit P-13 is the balance confirmation with regard to Cash Credit (special Contingency facility and Exhibit P-14 is the balance confirmation in respect of Cash Credit (Bills) facility. In view of the oral, as well as documentary evidence as referred to above the amount as claimed is proved to be due from the defendants. Issue No. 2 is decided accordingly in favor of the plaintiff Bank.

ISSUES 3 & 4

14. The defendants have raised a plea in paragraph 4 of the written statement which reads as follows:

"Even otherwise also the suit of the plaintiff is not maintainable. It may be stated that the alleged loan was given against an export bill. The export bill was covered by an Export Credit Guarantee of the Export Credit Guarantee Corporation and was ensured. As per the Insurance policy in the events of the export bill not being honoured, the said Guarantee Corporation would pay 90% of the bill amount. The plaintiff Bank took the policy from the Defendant No.1 and got the same assigned to export Credit Guarantee Corporation. When the assignment was made, all the rights to lodge the claim were transferred to the plaintiff bank meaning thereby in the event to the export bill being dishonoured the Bank was to lodge a claim on the export Credit Guarantee Corporation and was to get the money of the said bill from them. It may also be stated that the policy having been taken away by the plaintiff bank from the defendant No.1 he could not lodge any claim under the policy. Unfortunately, the export bill was not honoured. The Bank was thus required to lodge a claim on the Export Credit Guarantee Corporation who issued insurance cover for the said amount. It may be stated that had the plaintiff bank lodged the claim which the bank was under legal obligation bound to do, the Export Credit Guarantee Corporation would have paid the amount to the plaintiff Bank. However, the plaintiff Bank did not take any step in lodging the claim. Not only this but in order to get the payment, the defendants No.1 also went to New York as the bill was sent to the New York Branch of the plaintiff Bank for payment. The defendant No.1 also wanted to file a case against the customer in New York and for that purpose a letter from State Bank of India, New York Branch to the effect that the payment had been refused by the customer was also required, The New York branch of the State Bank of India refused to issue the required letter in spite of repeated persuasion by the defendant No.1. Not only this but the defendant No.1 through Darya Ganj Branch also repeatedly requested for the same."

In answer to the above, the learned counsel for the plaintiff Bank has reiterated that firstly the assignment of policy in favor of the plaintiff Bank has not been proved by the defendants and secondly it was the responsibility of the defendants to approach the ECGC (Export Credit Guarantee Corporation) as the policy was taken out by the defendants. This was postshipment policy taken out by the buyer and was alleged assigned. Thirdly in respect of police known as DSIGC (Deposit Insurance and Credit Guarantee Corporation) the claim was lodge with the Reserve Bank of India but the same was rejected vide communication received from Deposit Insurance and Credit Guarantee vide communication dated June 15, 1989. In any case, the amount even if it had been paid had to be returned on recovery from the defendants to the insurer. The liability of the defendants for the facilities granted by the plaintiff Bank could not be made dependent on the basis of the purported recovery of the insurance movies. The defendants have not proved any assignment in favor of the plaintiff Bank nor took any steps to lodge the claim and the plaintiff Bank could not be held liable for their lapses. These issue are also decided in favor of the plaintiff and against the defendants.

ISSUE NO.5

15. Defendant No.2 is the Guarantee and in terms of documents Exhibits P.5. (Agreement dated 12th January, 1978), P.6 (Demand Promisory Note dated 23rd February, 1978) and P.10 (Demand Promissory Note dated March 16, 1978) the Guarantor is as much liable as the principal debtor. Para 6 of the plaint in this regard may be reproduced as follows:

"On 12.1.1978 the defendant no.2 delivered to and deposited with the plaintiff title Deeds of her immovable property admeasuring 130 sq. yds (28'' 42'') out of Khasra No.512/208, situated at Village Moujpur, Illaqa Shadra, Delhi with intention to create an equitable mortgage in favor of the plaintiff as Collateral Security for the advances made by the plaintiff or defendant No.1 as stated in Sc hereinunder."

The testimony of PW2 reiterates that defendants No.2 had deposited title deed, of her property as guarantor by way of security in the instant case. The defendants themselves come to the Bank to deposit the title deeds which is indicated from the copy of the entry in the register Exhibit P-19. This issue also is decided in favor of the plaintiff and against the defendants.

16. In view of the facts and circumstances of the case and the aforesaid findings. I pass a preliminary decree in favor of the plaintiff and against the defendants for a sum of Rs. 1,19,112.00 with costs along with pendants life and future interest at the rate of 10 per cent annum from the date of institution of the suit till the date of realisation. Defendants are allowed six months time to make payment of the aforesaid decretal amount falling which it would be open to the plaintiff to seek for passing of a final decree in the suit.

