
(1995) 05 DEL CK 0031
In the Delhi High Court
Case No : Suit No. 2358 of 1985

State Bank of India

APPELLANT

Vs

Vipul Enterprises and Others

RESPONDENT

Date of Decision : 05-05-1995

Acts Referred:

Contract Act, 1872 — Section 139

Citation : (1995) 34 DRJ 233

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : J.L. Kalra, Anis Ahmed and A.C. Gambhir, for the Appellant;

Judgement

Usha Mehra, J.

(1) State Bank of India has sought recovery of Rs.4,64,655.73P from M/s Vipul Enterprises basing its claim on the cash credit facilities provided to the said Firm under the provisions of Credit to Small Scale Industries. These cash credit facilities in the form of cash credit (Factory Type). Cash Credit Bills, Medium Term Loan, Medium Term Equity Funds Scheme, Medium Term Clean Limit were sanctioned in 1982-83, in favor of the Firm through its sole proprietor i.e. defendant No.2. Defendants 3 to 6 stood guarantors for the repayment of these loans. Defendant No.2 was the sole proprietor of defendant No 1 at the lime of sanctioning of these credit facilities. He executed various loan documents. As a security he pledged the goods produced and merchandised by the defendant No.1 with the Bank. Defendants 1 & 2 also agreed to keep the margin in the goods pledged by the defendants to the bank in the ratio of 10% in the raw material and 10% of finished goods. They also pledged machine in the factory premises. It is the case of the plaintiff that the defendant's account became most irregular which inspire of reminders they did not clear the outstanding amounts, hence legal notice was served on them. As per the agreement" and the documents executed by the defendants, they were liable to pay interest at the rate of 18% p.a. on all the accounts except medium term loan on which the

defendants agreed to pay interest at the rate of 13.5% p.a. Since the accounts of the defendant became irregular, Therefore the plaintiff transferred the outstanding various loan accounts of the defendants to the protested hill accounts on 2nd December,1985. When the outstanding amounts inspire of legal notices were not paid, hence this suit.

(2) Summons in the suit were issued to defendants. On behalf of defendants 1, 2 & 6 one written statement was Filed on 2nd August,1986. On behalf of defendant No.4 written statement was Filed on 7th October,1986 and by defendant No.3 on 7th August 1986. Defendant No.5 was served through proclamation. The citation appeared in the newspaper "Statesman" on 21st December.1987 but when inspire of publication the defendant No.5 did not appear he was proceeded ex-parte vide order dated 3rd August, 1988.

(3) On the pleadings of the parties following issues were framed:-

1. Whether the suit is signed, verified and instituted by a duly authorised person ? OPP.

2.Whether the suit does not disclose any cause of action in favor of the plaintiff and against the answering defendants No.1, 2 & 6? OPP

3.Whether the suit is time barred? OPP

4.Whether the plaintiff is entitled to interest? If so at what rate and for what period? OPP

5.Whether the answering defendants No. 1,2 & 6 signed blank documents? OPD

6.Whether no equitable mortgage was created by the defendant No.6 in respect of the properly No.9() measuring 2400 sq.ft. Ashoka Garden, Ghazipur, Distt. Lucknow? .Lucknow? OPP-6.

7.Whether the defendant No.3 stands discharged from the guarantee ? OPD-3

8.Whether the defendant No.4 is a witness to various loan documents? If so, its effect? OPD-4

9.Whether defendant No.4 is not liable as a guarantor, the loan being secured by pledge of machinery and goods and mortgage of Immovable properly? If so, to what extent? OPD-4

10.What amount the plaintiff is entitled to and from whom? OPP

11.Relief

(4) I have heard Mr. J. L. Kalra for the plaintiff, Mr. Anis Ahmed for defendant No.3 and Mr. A. C. Gambhir for defendant No.4 and perused the oral and documentary evidence placed on record. My considered view on the above issues is as under

(5) Issue No.1 Evidence by the parties was recorded by the Local Commissioner.

plaintiff bank examined two witnesses namely Mr. Y. K. Gaur, Chief Manager, Shakur Basil Branch as LCPW-1 and Mr. J. N. Sharma, former Manager, Stale Bank of India as LCPW-2. On behalf of the defendants Mr. M. K. Vasil, defendant No.2 appeared as his own witness as LCDW-1. Mr. K. S. Bhalnagar, defendant No.3 as LCDW-2 and Mr. C. P. Purang, defendant No.4 as LCDW-3 Mr. Y. K. Gaur by his testimony proved that suit has been signed, verified and instituted by a duly authorised person. He proved the Regulation Nos.76 and 77 issued under the Stale Bank of India's General Rcgulation,1955 and also Gazette Notification dated 26th September,VW, Gazette Notification dated 26th August,1972, Gazette of India dated 24th July.1991, as Ex.LCPW-1/1 to 1/14. From this documentary evidence he established that he was authorised being Branch Manager of the plaintiff bank to sign, verify and institute the suit. This part of his testimony remained unresulted and uncontrolled on record. Only question asked to him was whether these Gazette Notifications were properly at- tested by the bank. The perusal of Ex. LCPW-1/1 to 1/4 leads to only one conclusion that these Gazette Notifications and regulations issued by the bank authorised and empowered Mr. Y. K. Gaur to sign, verify and institute the present suit. Therefore, from this unrebutted testimony of Mr. Gaur, to my mind, plaintiff hank has proved that suit has been signed, verified and instituted by a duly authorised person. This issue is accordingly decided in favor of the plaintiff and against the defendants.

(6) Issue No.2 Burden of this issue was on defendants 1, 2 & 6. They have miserably failed to discharge the burden. They have failed to point out as to how the plaint does not disclose any cause of action. On the contrary perusal of the plaint shows that case of the plaintiff is based on the various loan facilities provided to defendant No.1 through defendant No.2 and defendant No.6 mortgaged her Immovable property as security. Since, there was irregularity in .these loan accounts and there was outstanding amount against these defendants, Therefore, bank instituted this suit-for recovery of outstanding amounts. The plaint does disclose cause of action. This issue is also decided in favor of the plaintiff and against the defendants.

(7) Issue No.3 The burden of this issue was also on the defendants. They have failed to point out as to how the suit is barred by time. In fact the; cause of action arose in favor of the plaintiff lastly on 16th March,1985 when the defendants acknowledged their liability to pay the outstanding amounts by executing the balance confirmation receipt of the said date. The suit has been Filed on 7th December,1985,i.c. within three years of the last acknowledgement of debt. Hence the suit is within time. This issue-is thus decided against the defendants and in favor of the plaintiff.

(8) Issue No.4 So far as-this issue is concerned, the plaintiff by the testimony of LCPW-2, Mr. J. N. Sharma has proved that the defendant No.1 through its sole proprietary defendant No.2 executed loaning documents. These were filled up by him in his own handwriting. He further testified that the rate of interest was 1.5% below the State Bank Advance rate but minimum "being 15%. He proved

the Cash Credit Agreement as Ex.P-2. Ex.P-2 is in respect of Cash Credit (Factory Type) facilities of Rs.1 lac granted to defendant No.1. He further proved that defendant No.2 signed this document in his presence at point "A". On this facility interest was minimum 15%. Ex.P-3 is the intimation to defendant No.1 about sanction of Cash Credit (Factory Type) facility and Cash Credit Bill Facility to the extent of Rs.1,10,000.00 . Defendant No.2 signed this document at point "A" and counter-signed by Mr. C. L. Handa, Manager of the Bank. Ex.P.4 is a document whereby defendant No.1 offered machinery as security to the bank against loan. This document was signed by defendant No.2 at point "A". Ex.P-5 is an arrangement letter defining the terms and conditions in respect of Cash Credit (Factory Type) Loan granted to defendant No.2. So is the Ex.P-6. Ex.P-7 is a letter from defendant No.1 stating that they have no objection if the R.B.I. representative inspects the factory premises and books of accounts. Ex.P.8 is a promote executed by defendant No.1 through defendant No.2. This document was endorsed by guarantors i.e. defendants 3 to 6 in favor of plaintiff bank. Their signatures are at point "D", "E", "F" & "G". Ex.P.9 is the cover of D.P. Note Delivery Letter. It was signed by defendant No.2 on behalf of defendant No.1 and defendants 3 to 6 as guarantors. This part of his testimony that on these loans plaintiff was entitled to interest at the rate of 15% minimum there is no cross examination. This part of his testimony remained unrebutted on record. Thus it is fully established from this uncontroverted testimony that plaintiff bank was entitled to interest at 1.5% below the State Bank of India advance rate, minimum being 15%. plaintiff bank was entitled to this interest from the date the account became irregular.

(9) Issue No.5 Defendant No.2 M. K. Vasil, LCDW.1, appearing as his own witness admitted that he Signed the documents in connection with raising of loan from the plaintiff bank. He admitted the execution of the documents Ex.P.18 to P.21. He however, half heartedly stated that these were not complete when he signed the same. But at the same time admitted that no written protest was lodged for having made to sign on incomplete or blank documents. When subjected to further cross examination he could not deny that particulars in exhibit P.17 were already filled up and that correct particulars are written on these documents which were furnished by him. He also could not deny that these documents were executed on 8th December,1992. He admitted that on exhibits P.18 to P.21, his address, name of the firm and the date had already been filled in before he signed the same. Similarly on Ex.P.1/6 to P.1/10, he could not point any in-accuracy. He admitted having taken five loan facilities from the plaintiff bank. When subjected to further cross examination, he could not deny that these documents were filled in when he signed the same. He rather admitted that except the dates there was no filling in the blank in the Ex.P.6. The cutting of the date i.e. 1st March,1982 was initialled by him on Exhibit P-5. It was authenticated by affixing the rubber stamp and signature. On exhibit P.7 the date "1.3.1982" was scored out at two places. It was corrected and authenticated as "24.1.1983" by affixing the rubber stamp . and the signatures. Similarly on Ex.

P.8 and P.9 dates were scored and changed. Cuttings were authenticated and signed. On Ex.P.22 at page 11 writing was scored out from one end to another and the cutting was authenticated. He also admitted that pages 2 and 4 to 10 of Ex.P.22 bear his two signatures on each page - one in the left hand margin and the second at the bottom of each page. Similarly he admitted that EX.P.10 bears the signatures of defendants 3, 4 and 6 and so is the Ex.P.13, P.14 and P.16.

(10) From this evidence of Mr. Vasil, LCDW.1 the contentions of the defendants that they signed the documents when blank has not been proved. Rather from the cross examination it is fully established that the defendants signed the loaning documents when these were not blank. The issue is accordingly decided against the defendants and in favor of the plaintiff.

(11) Issue No.6 Burden of this issue was on defendant No.6. But she miserably failed to discharge the same. She is the mother of defendant No.2. She stood guarantor by mortgaging her Immovable property as security with the bank. This issue is accordingly decided against defendant No.6 and in favor of the plaintiff bank.

(12) Issue No.8 Defendant No.4 has miserably failed to prove that he signed the documents as witness and not as guarantor. On the contrary from the guarantee documents which have been proved on record by the testimony of Mr. J. N. Sharma, LCPW.2 it is proved that defendant No.4 signed these documents as guarantor and not as a witness. In fact the document of guarantee fully establishes that he stood as guarantor. There are five different transactions regarding grant of loan. These were of different dates. The defendant No.4 signed all these documents on five different dates. Therefore, the defense of defendant No.4 in this regard is contrary to the fully proved documents on record. EX.P.I is demand notice. There was no reply to this notice. Rather defendant No.2 Mr. M. K. Vasil appearing as LCDW.1 admitted in no uncertain words that defendant No.4 stood guarantee for him on his asking. This part of his testimony has not been subjected to cross examination. Therefore, in the absence of any proof that defendant No.4 stood as a witness, this issue is decided against the said defendant No.4 and in favor of the plaintiff.

(13) Issues No.7 & 9 : These issues are inter connected and raise common question of law, Therefore, these are taken up together and disposed of by one order.

(14) Section 139 of the Indian Contract Act (hereinafter called the Act) provides discharge of surety by creditor's act or omission impairing surety's eventual remedy. It further provides that if the creditor 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.

(15) Section 141 of the Act provides as under- "141. Surety's right to benefit of creditor's securities - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of

suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

SECTION 140 of the Act provides that after the surety makes the payment of the guaranteed debt on the default of the principal debtor then he steps into the shoe of the creditor upon payment or performance of all that he is liable for. Thereafter he is vested with all the rights which the creditor had against the principal debtor. Mr. Gambhir appearing for guarantor i.e. defendant No.4 and Mr. Anis Ahmed for defendant No.3 contended that from the testimony of defendant No.2, the principal debtor it is apparent that the bank lost the pledged goods. It is also admitted by the plaintiff's witness namely Mr. J. N. Sharma, LCPW-2 that the value of the pledged goods, stock and machinery was more than Rs.10 lacs. The value of the pledged machinery was Rs.2,30,000.00 . The value of the stocks and goods was more than Rs.5 to 6 lacs. As per the testimony of LCDW-1, Mr. M. K. Vasil i.e. defendant No.2 the said stock and the goods were not available at the time he made the statement. This shows that the creditor i.e. the bank omitted to take precautions for the safety of the pledged goods. It rather allowed the pledged goods, stock and machinery to be lost. Keeping in view the provisions of Section 139 read with Section 141 of the Act, on account of omission by the creditor, the surety stood discharged. Defendants 3 & 4 being the guarantors thus stood discharged. Had the pledged goods been available with the bank then in accordance with the provisions of Section 140 of the Act the guarantors-after making the payment of the decretal amount could have recovered the same from the sale of those pledged goods and machinery. In fact these defendants would have been stepped into the shoe of the plaintiff bank and could have recovered the amount by the sale of the pledged goods and machinery. But since the plaintiff bank has lost the pledged goods and machinery worth Rs.10 lakhs by this omission it has eventually lost the remedy of the guarantor against the principal debtors and thus impaired their rights. Therefore, they stood discharged.

(I) Mr. J. L. Kalra, appearing for the plaintiff bank on the other hand contended that the stock, goods and machinery which have been lost was not pledged with the bank. These were hypothecated and the control over the same was that of the defendants 1 and 2. Hence, provisions of Section 139 and 141 of the Act are not attracted in this case. I am afraid these arguments of Mr. Kalra are contrary to the record. Exhibit P.22 is Article of Agreement for Medium Term Loan for pledge of machinery. This has been so Admitted by LCPW.2 Sh. J. N. Sharma. Ex. P.5 dated 24th January, 1983 by which goods were pledged. Even in plaint the plaintiff bank has pleaded that goods, stock and machinery were pledged with the bank. Hence, Mr. Kalra's arguments now raised are contrary to the pleadings of the plaintiff and the evidence produced on record by the plaintiff. It has been established from the testimony of LCPW.2 Mr. J. N. Sharma as well as from the documentary evidence Ex. P.5 and P.22 that goods and machinery were pledged

with plaintiff by-defendant No. 1 through defendant "No.2

(II)Now turning to the value of the pledged goods it is in the testimony of LCDW.2 that the machinery which was pledged was worth Rs.2,30,000.00 and goods worth more than Rs.5 to Rs.6 lakhs.

(III)LCDW-1 Mr.M.K.Vasil, defendant No.2 admitted in his cross-examination recorded on 5th April,1994 that neither the stocks nor the machinery were available. This shows that the stocks and the machinery had been lost by the plaintiff bank. The value of the said machinery and the stock as admitted by Sh.J.N.sharma, LCPW-2 was more than Rs.10 lacs. In view of these admitted facts on record Mr.Gambhir contended that the guarantors stood discharged since the value of the suit is much less than the value of the pledged goods and machinery which has been lost by the plaintiff bank hence guarantors cannot be liable to pay the suit amount. In this regard he has placed reliance on the decision of Supreme Court in the case of The State Bank of Saurashtra V. Chitranjan Rangnath Raja and Anr. reported in Air 1980 S C 152. Supreme Court while interpreting Sections 139 and 141 of the Act observed that when the bank acted negligently with regard to the safe keeping and handling of the pledged goods and the security of pledged goods was lost on account of the negligence of the bank then the surety stood discharged to the extent of the security lost. Relying on these observations he contended that the security with the bank by way of pledged articles was more than Rs.10 lacs which consisted of machinery worth Rs.2,30,000.00 and goods worth Rs.5 to 6 lakhs. That having been lost by the bank, the defendants 3 & 4 who are guarantors stood discharged. To the same effect are the observations of Andhra High Court in the case of Vasireddi Seetharamaiah Vs. Srirama Motor Finance Corporation, Kakinada and Another, . While interpreting section 139 of the Act it was observed that the surety will stand discharged if the creditor docs any act which is inconsistent with the right of the surety. In this case the plaintiff bank neglected to keep in safe custody the security i.e. the machinery and goods worth Rs.10 lacs, hence on account of its omission the guarantors stood discharged of their liability to the extent of Rs.10 lakhs since the suit is of much less amount hence they are not liable to pay this amount. To the same extent are the observations of the Supreme Court in the case . of Amrit Lal Goverdhan Lalan Vs. State Bank of Travancore and Others, . Not only the bank lost the security, but the bank failed to recover the lost amount from the insurance company. As per LCPW.2 the said machinery and goods were insured. LCPW.2 admitted that no action was taken by the bank to recover the insurance amount. Therefore,it is apparent that plaintiff bank was negli- gent throughout and omitted to take action which a prudent person would have taken of his goods and machinery.

(16) Contention of Mr.Kalra that the machinery and goods were hypothecated and not pledged has been refuted by plaintiffs own document i.e. exhibit P.5. Vide Ex.P-5 dated 24th January,1983 defendants 1 & 2 offered physical possession of the factory premises where the machinery was installed and

permitted the bank to put its lock at the factory premises. This document Ex.P-5 corroborates the fact that the machinery and goods were pledged with the plaintiff bank. The possession was that of the plaintiff bank. Padlock on that was that of the plaintiff bank and if for any reason for no fault of defendants the plaintiff deliberately allowed the pledged goods to remain with defendants 1 and 2 then it cannot be said that the possession was not that of the plaintiff. The fact remains that the physical possession of the goods and machinery-was that of the plaintiff bank. Mr.Gaur admitted that in terms of Ex.P-5, the bank could have taken possession of the factory and put its lock as and when the bank wanted and demanded. - But why it was not done there is no answer except to say notice in this regard was issued. Therefore this act of the plaintiff shows negligence and omission to do an act which the bank was under obligation to do. The fact that the machinery and goods were pledged with the bank is also apparent from Ex.P-22 and P-5 executed by defendants 1 & 2 and also from the admission of LCPW-1 that possession was that of the bank and also from the testimony of LCDW.1 Shri M.K.Vasil (defendant No.2). Not only the possession was that of the plaintiff bank, but the plaintiff bank in order to ensure that the pledged goods re-main safe got it insured. Why steps were not taken to recover the amount from the insurance company has not been explained. Hence the reliance by Mr.KaIra on the decision of the Punjab & Haryana High Court in the case of Bank of India, Bombay Vs. Yogeshwar Kant Wadhera and Others, is of no help to him. Nor the decision of Madras High Court in the case of J.Harigopal Aggarwal Vs. The State Bank of India Air 1976 Mad 211 is attracted to the facts of this case. The Punjab & Haryana High Court was dealing with the case of the hypothecated goods, where the possession of the goods was that of the party and not of the bank. In the present case it is the plaintiff's own case that the defendants No.1 and 2 pledged the machinery and goods with the bank. It is so stated in para 5-A of the plaint. This fact is further corroborated by the testimony of Mr.J.N.Sharma, LCPW-2 who admitted that the loan which was given by the bank was a secured loan and the security furnished by defendants 1 & 2 to the plaintiff bank was the stock and machinery. Goods and machinery was pledged with the bank. Mr.Gaur, LCPW-1 also admitted that as per the agreement the machinery and the goods were to be in the custody of the plaintiff bank.

(17) For the reasons stated above the only conclusion which can be arrived at is that " since the plaintiff bank was negligent in discharging its duty or omitted to do the act which it was required to do, Therefore, the defendants 3 and 4 stood discharged.

(18) Issue No: 10. From the evidence which has come on record it is apparent that defendant No.1 through defendant No.2 took five different types of loan which have not been fully repaid by defendants 1 & 2. Defendant No.6 who furnished her property as equitable mortgage to secure the repayment of the loan is equally liable. Defendant No.2, appearing as LCDW-1 admitted the execution of the loaning documents and the documents executed by his mother defendant No.6 and the receipt of the loan and the acknowledgement and

confirmation of balance amount. Hence in view of the unrebutted and controverted evidence which has come on record, the plaintiff bank is entitled to recover the suit amount against defendants No.1, 2 and 6 of Rs.4,64,655.75 paise with cost and interest at the rate of 15% per annum pendente lite till realisation.