

(2003) 06 GUJ CK 0029

In the Gujarat High Court

Case No : First Appeal No's. 718 and 930 of 1978

State of Gujarat

APPELLANT

Vs

State Bank of Saurashtra

RESPONDENT

Date of Decision : 01-06-2003

Acts Referred:

Contract Act, 1872 — Section 128, 130, 134, 140, 141
Industries (Development and Regulation) Act, 1951 — Section 18A
Sick Textile Undertakings (Nationalisation) Act, 1974 — Section 20, 29, 3, 4, 5

Citation : (2004) 1 GLR 213

Hon'ble Judges : J.N. Bhatt, Acting C.J.;K.A. Puj, J

Bench : Division Bench

Advocate : Manisha Lavkumar, AGP in First Appeal No. 718 of 1978, for the Appellant; S.B. Vakil, in First Appeal No. 718 of 1978, S.B. Vakil and Manisha Lavkumar, AGP for Respondent Nos. 5 and 6 in First Appeal No. 930 of 1978, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—These two First Appeals are filed by the appellants in their respective First Appeals against the judgment and decree passed by the learned Civil Judge (SD) at Bhavnagar on 31st January 1978 in Special Civil Suit No. 45 of 1968. The First Appeal No. 718/78 is filed by the State of Gujarat as well as the Gujarat State Textile Corporation Limited, who were the defendants No. 12 and 13 in the Special Civil Suit No. 45 of 1968 and were aggrieved by and dissatisfied with the judgment and decree of the learned Civil Judge (SD) holding them liable only to the extent of Rs. 38,00,614.30 ps., as specified in Deed of Guarantee. The First Appeal No. 930 of 1978 is filed by the original-defendants No. 2 to 10. The original-defendants No. 2 to 7 who are the appellants No. 1 to 6 in the First Appeal No. 930 of 1978 have challenged the judgment and decree holding them liable for the amount of Rs. 95 lakhs. The original-defendants No. 8 to 11, who are the appellants No. 7 to 10 in First Appeal No. 930 of 1978, have challenged the judgment and decree holding them liable to the extent of Rs. 25

lakhs. They have also challenged the direction of the learned Civil Judge (SD) to the effect that the decretal amount only to the extent of Rs. 25 lakhs could be recovered from the properties of Industrial Engineering Company. In both the appeals, the appellants have also challenged the finding of the learned Civil Judge (SD) to the effect that the original-plaintiff the present respondent No.1, that is State Bank of Saurashtra was entitled to recover a sum of Rs.60,40,648.70 ps. with 6% running interest during the pendency of suit and cost of the suit from defendants subject to the limitations specified in the judgment and they have also challenged the finding that no decree was solicited against National Textile Corporation, the original-defendant No.1-A in the suit. Since both the Appeals relate to and arose out of the same judgment and decree passed by the learned Civil Judge (SD), Bhavnagar in Special Civil Suit No. 45 of 1968, the same are being disposed of by this common judgment.

2. The brief facts, giving rise to these two First Appeals, are that the original-plaintiff - the respondent No.1 herein, has instituted a Special Civil Suit No. 45 of 1968 in the Court of Civil Judge (SD) at Bhavnagar to recover a sum of Rs. 60,40,648.70 ps. being the principal amount and interest due from Mahalaxmi Mills Ltd., the defendant No.1, being the principal debtor as on 24.10.1968. This amount was claimed against the original-defendants No. 2 to 7 - the appellants No. 1 to 6 in First Appeal No. 930 of 1978 as guarantors by virtue of Deed of Guarantee and Pronote dated 28.10.1965 executed by the original-defendants No. 2, 3, 6 and 7 being Exhibits 183 and 184 and Letter of Guarantee and Pronote dated 29.9.1968 executed by the original-defendants No. 4 and 5 being Exhs. 192 and 193. The original-plaintiff has restricted its claim against the original-defendants No. 8 to 11 to the extent of Rs. 25 lakhs with interest by virtue of Letter of Guarantee and Pronote and documents depositing Title Deeds of Thana properties by way of equitable mortgage dated 10.3.1967, the Exhibits being 195, 196, 197 and 198. After the institution of the suit, a notification was issued u/s 18A of the Industrial Development and Regulation Act, 1951 appointing the Gujarat State Textile Corporation (GSTC) as Authorised Controller and the same GSTC took possession of the undertaking of the original-defendant No.1 Mills Company and of certain movables which were pledged and hypothecated and which were in possession of the original-plaintiff bank. In the year 1972, the Gujarat Government and GSTC executed Letter of Guarantees dated 28th May 1972 being Exh. 202, in respect of the past dues of the original-defendant No.1 Company and as a result thereof, the Gujarat Government as well as the GSTC were impleaded as defendants No. 12 and 13 in the said suit and claim against them was restricted to the amount guaranteed by them, namely Rs. 38,00,640.30 ps. From 1-4-1974, the appointed day under the Sick Textile Undertaking (Nationalisation) Act, the textile undertaking of the original-defendant No.1 Mills Company was nationalised and vested in the Central Government for compensation of Rs. 83,61,000 and all the properties of the original-defendant No.1 Company accordingly vested in the National Textile Corporation (NTC), free from any encumbrance. As a result thereof, the NTC was

impleaded as defendant No.1-A in the said suit.

3. As far as the original-defendant No.1 is concerned, it has filed written statement at Exh. 83. However, no evidence was led during the course of the trial. The newly added party, namely NTC, the original-defendant No.1A in the suit has not filed any appearance and suit was proceeded ex-parte against the said defendant. As far as the original-defendants No. 2 to 5 are concerned, they have filed their written statement at Exh. 84 inter alia contending therein that the Court had no jurisdiction to entertain the suit and that they were wrongly impleaded as defendants in the said suit and thus the plaintiffs are not entitled to recover any amount from them. The original-defendants No. 3 and 4 have filed their additional statements at Exh. 168 inter alia contending therein that because of the Sick Textile Undertaking (Nationalisation) Act, 1974, the claim of the plaintiff Bank against the defendants-guarantors was extinguished and that the undertaking of Mahalaxmi Mills stood transferred and vested absolutely in Central Government, free from any encumbrance and that, therefore, because of Sections 3 and 4 of the said Act, the Guarantee Deed itself was extinguished and hence the liability of the defendants-guarantors stood discharged in law. The original-defendants No. 8 to 11 have filed their written statement at Exh. 85 inter alia contending that the court had no jurisdiction to try the suit and that the suit was bad because of nonjoinder of parties and misjoinder of cause of action and that the suit was barred by limitation and that the original-defendants No. 8 to 11 did not agree for continuing various facilities given to the original-defendant No.1 by the plaintiff-bank in March 1969 and that it was not agreed that the said guarantee of M/s. Industrial Engineering Company of Rs. 25 lakhs should be secured by creation of equitable mortgage of the properties of the firm in Thana district and that the plaintiff bank had already recovered a sum of Rs. 40 lakhs which the Bank should give credit to them. The original-defendants No. 12 and 13 have filed their written statement at Exh. 159 inter alia contending that the suit was not maintainable against them and that the same was also barred by limitation as far as they are concerned and that the Gujarat Government was not liable on the basis of the alleged Guarantee Deed and that there was a material change in the terms of the Guarantee Deed as a result of taking over of the textile undertakings and the possession of the defendant No.1 Mills Company by the Central Government. The original-defendants No. 12 and 13 were to be relieved and discharged from all the liabilities and the debts regarding the said Mills Company, and that the Commissioner for Payments appointed by the Government of India was the proper authority to settle and finalise the dues of the plaintiff-bank and hence no decree could have been passed against them. The original-defendants No. 6 and 7 have not filed any written statement though appearances have been filed on their behalf.

4. After having considered the pleadings of the parties, the learned Civil Judge (SD) at Bhavnagar had framed as many as 35 issues and after appreciating the oral as well as documentary evidence and considering the relevant statutory provisions and the case law on the subject, had passed the judgment and decree

in the above terms which is under challenge in these two First Appeals before this Court.

5. As far as First Appeal No. 718 of 1978 is concerned, the main challenge which is made in the Memo of Appeal is that the appellant could not have been impleaded as a party in the suit as the cause of action in respect of the appellant arose subsequent to the date of the suit. It was also contended that on coming into force of the Sick Textile Undertaking (Nationalisation) Act, 1974 all the properties were vested in the Central Government and the plaintiff was entitled only to recover its dues from the amount of compensation and all the guarantors have been discharged from their liability. It was also contended that the assets of the Mills Company exceeded its liabilities and on vesting of all the assets in the Central Government, the liability of the guarantors was extinguished. It was further contended that because of the Nationalisation Act, the sureties had lost the benefit of securities and therefore the contract of guarantee stood discharged.

6. As far as First Appeal No. 930 of 1978 is concerned, the main challenge to the impugned judgment and decree which is made in the Memo of Appeal is that the liability taken by the GSTC was the liability after the management was taken over by the Central Government and therefore plaintiff-Bank was entitled to claim that amount from the Central Government if the plaintiff-Bank's dues were not discharged fully from the amount of compensation. It was further contended that under the scheme of Nationalisation Act, a special forum has been created for adjudicating the claims against the sick textile unit and reading Section 29 of the Act along with the scheme, it leaves no doubt that the provisions of the Act have overriding effect upon the other laws and therefore the Civil Court has no jurisdiction to try the said suit. It was also contended that when the management was taken over by the Central Government, the new management took possession of the property by giving a fresh guarantee and they have voluntarily transferred all assets thereby losing securities by plaintiff-Bank while the suit was pending and the decree for sale of these assets for recovery of the amount was prayed for by the plaintiff-Bank. It was also contended that the loss of security was not by inaction of the guarantors but by the voluntary action by the plaintiff-Bank to strengthen its position by obtaining guarantees from the State Government for its own benefit and to the prejudice of the appellant-guarantors and therefore no recovery could be enforced against the appellant-guarantors. It was also contended that the learned Civil Judge (SD) has not considered all the facts and documents in their proper perspective and the correct law has not been applied to the facts and ultimately passed an erroneous judgment and unlawful decree against the appellants and hence the same is required to be quashed and set aside.

7. As far as First Appeal No. 930 of 1978 is concerned, nobody appears on behalf of the appellant. Mr. SB Vakil, the learned Senior Counsel appearing for respondent No.1 Bank is present and Ms. Manisha Lavkumar, the learned AGP appearing for respondents No. 5 and 6 is present. As far as First Appeal No. 718

of 1978 is concerned, Ms. Manisha Lavkumar, the learned AGP appearing for the appellant is present and Mr. SB Vakil, the learned Senior Counsel appearing for respondent No.1 Bank is also present. Nobody appears on behalf of respondents No. 2 to 12.

8. The main thrust of the argument was that because of the provisions of the Sick Textile Undertaking (Nationalisation) Act, 1974, the liability of principal-debtor, i.e., respondent No.1 herein ceases to exist beyond the scope of the one specified in the Act and therefore the liability of the guarantor ceases and the creditor-bank has lost its securities which are vested in the Central Government free from all encumbrances and therefore the sureties stand discharged. The question regarding the jurisdiction of the Civil Court was also raised by the learned Asst. Govt. Pleader. It is contended, that Civil Court's jurisdiction is impliedly taken away by the provisions of the said Nationalisation Act. It is further submitted that Section 20 of the said Act requires the plaintiff to lodge its claim before the Commissioner. Section 29 of the said Act provides that the provisions of the Nationalisation Act shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force or in any instrument having effect by virtue of any law. It is therefore contended that the plaintiff Bank having concurrent remedies of either putting up its claim before the Commissioner appointed under the Nationalisation Act or under the ordinary forum of law, because of Sec. 29 of the Nationalisation Act is enjoined to lodge the claim before the Commissioner. It is further contended that if the claim is lodged before the Commissioner and if the Commissioner entertains the claim, then being dissatisfied with the adjudication of the claim by the Commissioner u/s 23(7) the Act, the plaintiff can come in appeal to the Civil Court but his remedy of preferring the claim in the original jurisdictional forum of the Civil Court is not available.

9. It is further contended that the appellants in First Appeal No. 718 of 1978 stood as guarantors and it was on the basis of the statutory provision that the claim of the plaintiff was to be realised from the securities of the properties of the Mills company which was admittedly of higher value than the claim of the plaintiff and that the sureties, if called upon to pay, would recover their dues from the securities but as the plaintiff lost the securities, sureties are not in a position to recover the money from the securities if they are called upon to pay up the claim of the plaintiff and that therefore the sureties stand exonerated from their personal liability. For this purpose, reliance was placed on the provisions contained in Sections 140 and 141 of the Contract Act. It is further contended that the securities which the plaintiff had against its claims were lost by the plaintiff as the same were vested in the Central Government or National Textile Corporation free from all encumbrances as a result of coming into force of the Sick Textile Undertaking (Nationalisation) Act, 1974. The sureties, though entitled to the benefit of securities as per Sections 140 and 141 of the Contract Act, could not follow them and hence the contract of guarantee between the creditor and the surety stand discharged, as the act of plaintiff-creditor losing the

security was detrimental to the interests of the sureties.

10. It was further contended that the plaintiff-Bank must exhaust all remedies against the principal-debtor before enforcing the law against the guarantors and hence the decree passed against the guarantors should be held to be illegal and unlawful and it is to be quashed and set aside.

11. Except the above points, no other point has been argued nor pressed into service before this Court.

12. Mr. SB Vakil, learned Senior Counsel appearing for the respondent No.1-Bank in both the Appeals, has strongly supported the order passed by the learned Civil Judge and submitted that the learned Judge has discussed at length all the issues which are raised before him and after considering the relevant statutory provisions as well as authorities on the subject, had taken the correct view and the same may not be disturbed by this Court in these appeals. He has also invited our attention to the various statutory provisions and the relevant case law on the subject. We, however, are of the view, that the view taken by the learned Civil Judge on the issues which are raised before us, is a just and proper view and it is taken in accordance with the statutory provisions and on the basis of the decided case law, and, hence, we are not going into the details of the said discussion, which is otherwise elaborately made by the learned Civil Judge in the impugned order. We, however, take note of the recent judgment of the Hon"ble Supreme Court, in the case of Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others, , and while following the said judgment, quoted the following passages, which covers the present controversies :

"That because of the Sick Textile Undertaking (Nationalisation) Act, 1974, there is no discharge of the liability of principal-debtor, leave alone that of the surety. Sections 3, 4, 5 and 20 of the Act of 1974, if read together, would depict that the liability of the owner of the undertaking/the debtor continues and it is only that the claim against the security which stands discharged by reason of the statutory shift of the charge on to the compensation. The liability of the principal debtor does not in any way come to an end neither that of the guarantor."

While observing this, the Hon"ble Supreme Court has referred to the decision given by Three Judges" Bench of the Hon"ble Supreme Court in Civil Appeal No. 15521 of 1996 (Punjab National Bank vs. State of U.P. & Others). The said decision was reproduced on Page 1854 of the Report in its entirety. It is as under :

"The appellant had, after respondent No. 4"s management was taken over by the U.P. State Textile Corporation Ltd. (respondent No.3) under the Industries (Development and Regulation) Act, advanced some money to the said respondent No.4. In respect of the advance so made, respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the Bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, respondent No.3 which had taken over the management of respondent No.4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short "the Act"). The appellant filed suit for recovery against the guarantors and the principal-debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed :

"Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the W.S. of defendant No.2 ?"

The trial court as well as the High Court both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the Courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that said Act have a overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another, where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from guarantor in view of the language of Section 128 of the Contract Act as there is no discharge u/s 134 of that Act."

13. With regard to the submission canvassed before us to the effect that the guarantors are discharged from their liabilities as the plaintiff-Bank being the creditor had lost the securities, the same pale into insignificance in view of the following observations made by the Hon"ble Supreme Court in the Report.

"The expression "if creditor loses security in S. 141 means" and implies a voluntary act by reason whereof the creditor loses the security and which thus tantamounts to be without the consent of the surety. The expression "or" in between the words "creditor loses" and "without the consent of the surety" and the coma read in its proper sphere after the word "loses" and surety stands out to be significant since the same qualifies only the latter part of the second limb, namely, parting with such security. The expression "creditor loses" cannot mean and imply an involuntary act but by reason of an act which is attributable to the creditor. The second alternative, parting with security without the knowledge of the surety is a contra situation, but affords a meaning to the words used in the first para, to wit, "the creditor loses". S. 141 would lose its efficacy and the Act would render itself totally nugatory if the expression is held as contemplating both voluntary and involuntary acts of the creditor. A definite volition is required

to come within the ambit of Section 141. The heading of Section 141 also lends, though not normally a part of the statutory provision, assistance in interpreting the statutory intent since heading always serves as a guide to depict the intention. The contract of guarantee though it is not a contract regarding a primary transaction : but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefor the Statute has provided both the creditor and the guarantor some relief as specified in Ss. 130-141 of Contract Act. Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor."

With regard to the appellant's submissions that because of the nationalisation of the Textile Undertakings, the contract of guarantee was frustrated because such vesting of assets in Government has frustrated the contract of guarantee. While negating this contention, the Hon''ble Supreme Court has held that the contract of guarantee has no correlation with the Nationalisation Act. It is an independent contract and in all fairness has to be honoured to fulfill the contractual obligation between the surety and the creditor. It was further held by the Hon''ble Supreme Court that recourse to Section 141 is also not available to the surety.

14. Even with regard to the submission that a creditor of nationalised textile undertaking can lodge the claim before the Commissioner of Payments and hence it would debar from filing special suit for recovery, the Hon''ble Supreme Court has held that the right of a claimant to proceed before the Commissioner and to file a suit to recover the due from him cannot, on a perusal of a statute, be taken away though the claimant would not be entitled to recover any amount at both the ends. The amount paid by the Commissioner would stand reduced to the extent of payment made by the Commissioner. The filing of civil suit thus is not barred.

15. From the above discussion, in our view, after this judgment of the Hon''ble Supreme Court, virtually all issues raised in the present Appeals stand concluded and hence the present appellants would not succeed in their attempt to challenge the impugned order on these grounds.

16. Even with regard to the issue that the creditor must exhaust all remedies against the principal-debtor before enforcing the liability against the guarantor, the Hon''ble Supreme Court has taken the view, in the case of State Bank of India Vs. Messrs. Indexport Registered and others, , while overruling the earlier Judgment of the Hon''ble Supreme Court in the case of Union Bank of India Vs. Manku Narayana, that even if the two portions of the decree are severable and merely because a portion of the decretal amount is covered by the mortgage decree, the decree-holder per force has to proceed against the mortgaged property first are not based on any principle of law and the Hon''ble Supreme Court has observed that the view taken in that case was not the correct view. It was further observed that when the money decree was against all the defendants including the guarantor and a mortgage decree against one of the defendants

who had mortgaged the shop with the plaintiff-Bank, So far as the said shop was concerned and the decree did not put any fetter on the right of the decree holder to execute it against any party whether as a money decree or as a mortgage decree, the decree holder would be entitled to proceed against the guarantor first for execution of the decree. Moreover it is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that the "liability of the surety is co-extensive of the principal debtor, unless it is otherwise provided by the contract". If on principle a guarantor could be sued without even suing the principal debtor, there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor.

17. In view of the above referred two binding decisions of the Hon"ble Supreme Court and in view of the finding arrived at by the learned Civil Judge, after appreciating the facts and circumstances of the case and after applying the law to the facts, we are of the view that the learned Civil Judge has not committed any error, and the view taken by the learned Single Judge is, therefore, upheld. Accordingly, both these First Appeals are dismissed without any order as to costs. Decree be drawn accordingly.