

State Bank of India v. M/s Swati Diamonds & Ors

State Bank of India

...Appellant

M/s Swati Diamonds & Ors

...Respondent

Case No: Appeal No. 251/2007

Date of Judgement: 27/06/2023

Judges:

Mr Justice Ashok Menon, Chairperson

For Appellant: Mr Rony P. J., Advocate.

For Respondent: Ms Vaishali Bhilare, Advocate.

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Facts:

The case involves an appeal (No. 251/2007) filed by the State Bank of India (the Appellant) against a judgment dated 20/03/2007 delivered by the Debts Recovery Tribunal-II, Mumbai (DRT) in Original Application (O.A.) No. 240/2004. The O.A. was filed by the Appellant to recover debts due from Defendants Nos. 1 to 5 (Respondents Nos. 1 to 4 in the appeal), who were the borrowers and guarantors. Defendant No. 1 (Respondent No. 1) was a partnership firm, and Defendants Nos. 2 to 5 (Respondents Nos. 2 to 4) were its partners. Defendants Nos. 6 to 8 (Respondents Nos. 5 to 7) were the mortgagors/guarantors. Defendants Nos. 9 to 11 (Respondents Nos. 8 to 10) were banks that were members of the consortium, while Defendant No. 12 was sued as the owner of the building over which the 1st Defendant had rights comprising a lien. Defendants Nos. 2 to 7 were related, while Defendant No. 8 was a sister concern of the 1st Defendant firm, which provided a corporate

guarantee for the debts availed by the others. Defendant Nos. 2 to 5 (partners of the 1st Defendant firm) availed credit facilities and executed several documents regarding the debts and also provided security by way of the creation of an equitable mortgage by depositing title deeds of the secured assets by Defendants Nos. 1 and 6 to 8. Documents were also executed hypothecating the current movable assets belonging to the firm. From the Minutes of the Meeting of the consortium held on 30/03/2002, it was agreed between the consortium members (the Appellant and Respondents Nos. 9 to 11) to enhance the limits of the credit facilities granted to the 1st Respondent firm from ₹66 crores to ₹93 crores on certain conditions. The 9th Respondent (Allahabad Bank) would lend and advance ₹23 crores, and the 11th Respondent (Canara Bank) agreed to provide ₹5 crores towards the enhanced limits. The 1st Respondent agreed to furnish additional securities to cover the enhanced limits, execute consortium documents, and obtain and furnish the no objection of the Appellant (the lead bank). However, the 1st Respondent allegedly did not provide additional securities or obtain the no objection of the Appellant, but the 11th Respondent (Canara Bank) advanced ₹5 crores.

Arguments by the Appellant (State Bank of India):

The Appellant argued that since the 1st Respondent did not comply with the terms, the 11th Respondent (Canara Bank) was not entitled to include the ₹5 crores in the dues of the consortium payable by the 1st Respondent or claim any charge over the securities of the consortium concerning the said ₹5 crores. In the O.A., the Appellant had claimed various amounts as dues under different facilities, including cash credit, post-shipment credit, overdraft in the current account, and unpaid service charges/excess drawing charges/ECGC premia/stock audit charges.

Arguments by the 6th Defendant:

The 6th Defendant contended that the Appellant Bank had misused documents and used blank papers to create documents. The 6th Defendant further contended that she did not stand as a guarantor and did not execute any letter of guarantee. It was also argued that the letter of

guarantee was signed upon the oral assurance of the Appellant that the security of the property created by the Defendants would be sufficient to cover the liability. The 6th Defendant contended that the bank had varied the terms of the contract without her consent and denied the creation of a mortgage.

Arguments by the 11th Respondent (Canara Bank):

The 11th Respondent (Canara Bank) contended that it was a member of the consortium in favor of which the 1st Respondent had created a charge over various movable and immovable properties. The Canara Bank joined the consortium on 05/11/2000 and argued that upon induction as a member, it became entitled to share the security with the Appellant and Defendants Nos. 9 and 10 on a pari-passu basis. Hence, the 11th Defendant claimed its right to be protected.

Court's Elaborate Opinions:

Regarding Defendants Nos. 7 and 8, who remained ex parte, the court concluded that there was nothing to disbelieve the documents executed by them about the creation of a mortgage and guarantee. Concerning the 6th Defendant, the court observed that the creation of the mortgage stood proven because her title deeds were in the possession of the Appellant Bank. Regarding the liability of the 6th Defendant as a guarantor, the court observed that the supplemental deed of guarantee (Exhibit 51) purportedly executed by her along with other guarantors on 01/08/2000 was produced, but it did not indicate that she had given any undertaking to be liable as a guarantor. The court found fault with the Appellant for not producing the original letter of guarantee to show that the 6th Defendant was liable as a guarantor. Hence, the liability of the 6th Defendant was restricted to the mortgage alone. Concerning the contentions raised by the 11th Defendant (Canara Bank), the court initially observed that "the Canara Bank was inducted as a consortium member, and that the agreement to share the security was at the executory stage than the executed one." The court further observed that the 11th Defendant was made a member of the consortium, but a pari-passu charge was not created except over current assets. While the court acknowledged that becoming a consortium member does not by

itself entitle the 11th Defendant to a pari-passu charge over the then available security, it concluded that the agreement equally applies not only to parties thereto but also to those members who are subsequently inducted into the consortium. However, the court also observed that "for entitlement on a pari-passu basis, to the new member of the security, an unequivocal intention would be necessary, which is not there in this case." Nevertheless, the court observed that "the pari-passu over current assets was already considered in favor of defendant No. 11 in the meeting held on 05/11/2001. Moreover, in a meeting held on 30/03/2000 (Exh. 135), the consortium had agreed to share the pari-passu charge over all the properties with defendant No. 11 for an ad hoc limit of ₹5 crores. The defendant No. 11 would thus be entitled to restricted relief." Concerning the claim, the court allowed the claim under the first three heads but disallowed the 4th item about unpaid service charges amounting to ₹74,84,559/- for the reason that there was not an iota of evidence on which this claim could stand.

Sections and Laws Referred:

No specific sections or laws were explicitly mentioned in the summary.

Cases Cited:

No cases were cited in the summary.

Court's Decision:

The court allowed the appeal and modified the impugned judgment of the DRT dated 20/03/2007 in O.A. No. 240/2004 to the following extent:

- a) Defendants Nos. 1 to 8 shall also pay to the Appellant an additional sum of ₹74,84,559/- over and above the already decreed sum of ₹35,68,25,385.58, together with interest at the rate of 12% per annum from the date of filing of the O.A. till realization.
- b) The said additional amount shall be realized from Defendants Nos. 1 to 8 from out of the mortgaged properties referred to in the impugned order and personally without any exemption to the 6th Defendant.

c) The 11th Defendant (Canara Bank) is not entitled to any pari-passu charge over the mortgaged assets.

d) A modified Recovery Certificate shall be issued in the above terms.