BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 219/2013

Between

J. M Financial Reconstruction Co. Pvt. Ltd. … Appellant/s

V/s.

International Hometex Ltd. & Ors. …Respondent/s

Mr Charles D'Souza i/b M/s. Consulta Juris, Advocate for Appellant.

Ms Kamini Yadav, i/b M/s M. V. Kini & Co., Advocate for Respondent No.5.

-: Order dated: 20/02/2023:-

The Appellant, an Asset Reconstruction Company is an assignee of a debt from the Indian Overseas Bank (IOB). The 1st Respondent is a company which has gone into liquidation and is presently represented by an Official Liquidator. Respondents Nos. 2 to 4 were the directors of the company and also stood as personal guarantors for the financial facilities which were provided to the 1st Respondent company as the principal borrower, by the IOB. The Appellant prefers this appeal under Sec. 20 of the Reconstruction of Debts Due to Bank and Financial Institutions Act, 1993 ('RDDB & FI Act', for short) impugning the judgment of the Debts Recovery Tribunal-II, Mumbai (DRT) dated 25/10/2012 in Original Application (O.A.) No. 2 of 2010.

2. The above-mentioned O.A. No. 2 of 2010 was filed by the IOB for recovery of a debt due to it from Respondent Nos. 1 to 4.

Secured assets belonging to these Respondents were also sought to be proceeded against. Respondents Nos. 5 to 7 are the other creditor banks having pari-passu charge over the mortgaged assets.

3. The 1st Respondent as the principal borrower and Respondents Nos. 2 to 4 as guarantors had approached the IOB for credit facilities and a term loan of ₹340 lakhs, and ₹110 lakhs as working capital for export packing/foreign bill discounting and letter of credit was sanctioned vide sanction letter dated 16/04/2004. Different documents like Demand Promissory Note, Term Loan Agreement, Agreement of Hypothecation were executed by the 1st Respondent. Personal letters guarantees were executed by Respondents Nos. 2 to 4 on 28/04/2004. The property belonging to the 8th Respondent entrusted on lease to the 1st Respondent company was mortgaged to the IOB pari-passu with Respondents Nos. 5 to 7. The Term Loan Facility and the Cash Credit Facility were extended further for a sum of ₹255 lakhs and ₹257 lakhs respectively, and a fresh Letter of Credit for ₹28 lakhs and a letter of guarantee for ₹18 lakhs were also sanctioned vide sanction letter dated 23/12/2005. Letters of guarantee were executed by Respondents Nos. 2 and 3 on 28/12/2005. The mortgage was also extended pari-passu with the other creditors. Revival letters were executed in 2007 and 2008. The payment of the debt was defaulted and hence, IOB filed OA No. 2/2010 before the DRT for recovery of the debt due and for enforcement of the mortgage. The debts were thereafter assigned by IOB to the Appellant and the Appellant got itself substituted in the Original

Application before the DRT.

4. The Ld. Presiding Officer, vide judgment and order dated 25/10/2012 allowed the Original Application against Defendants Nos. 1 to 3, but dismissed the same as against Defendant No. 4 for the reason that the 4th Defendant did not execute a letter of guarantee as was executed by Defendants 2 and 3 on 28/12/2005, and moreover, the sanction letter of the extended loan dated 23/12/2005 did not provide the 4th Defendant as a guarantor. The Appellant is aggrieved by the dismissal of the O.A. as against the 4th Defendant, and hence, in appeal.

5. The short question that arises with determination in this appeal is whether the Ld. Presiding Officer was justified in excluding the 4th Defendant/Respondent from the liability of the debt due to the Appellant.

6. Mr Charles D'Souza, the learned counsel appearing for the Appellant submits that the initial deed of guarantee executed by the 4th Respondent indicates that it is a continuing guarantee. The sanction letter dated 16/04/2004 indicates that the 4th Respondent stands a personal guarantee worth ₹42.72 lakhs as of 31/03/2003. The letter is also signed by the 4th Respondent. Clauses 9 and 10 of the letter of guarantee executed and signed by the 4th Respondent on 28/04/2004 reads thus:

> "9. And it is further agreed and declared that this guarantee shall be continuing guarantee irrespective of any sum or sums which may be paid into the account of the principal at any time during the continuance of the guarantee and shall remain in force until cancelled by

my/our written authority, the amount then due to be subject to this guarantee and secured thereby.

10. And I/we hereby expressly declare that this guarantee and the powers and provisions herein contained are in addition to and not by way of limitation or by substitution for any former or other guarantees or guarantee heretofore given to you by and shall continue to be binding notwithstanding any changes which may from time to time take place in the partners or constitution of my /our firm or in the partners or constitution of the principal."

7. The Ld. Counsel Mr Charles draws my attention to the credit sanction advice dated 23/12/2005 which contains the sanction endorsement giving the details of the facilities and specifically indicates that the cash credits against receivables were enhanced from ₹110 lakhs to ₹257 lakhs. It is true that the 4th Defendant is not a party to the said sanction letter but in view of clauses 9 and 10 to the guarantee executed on 28/04/2004, it binds the 4th Defendant as well, submits the Ld. Counsel. Moreover, the Ld. Counsel also draws my attention to the written statement filed by the defendants to point out that nowhere in the written statement is it pleaded that there is no continuing guarantee or that it was recalled. The only contention in the written statement is that the subsequent guarantee has not been signed by the 4th Defendant, and hence, it is not binding upon her. It is also contended in the written statement that there is a novation of contract by extending the credit facilities granted to the 1st Defendant company. Mr Charles relies upon two decisions of the Hon'ble Supreme Court in support of his argument that when there is a continuing guarantee, the liability of

a guarantor continues until revoked or discharged. In *Narinder Pal Agarwal of Mumbai, Indian Inhabitant vs. Saraswat Co-Operative Bank Ltd., A Multistate Co-Operative Bank and Ors. 2019 SCC OnLine Bom 45*, the contention was that the bank had entered into a new contract with one of the Respondents and had also granted further financial limits for which a fresh set of documents were executed for which the contesting party's consent was not obtained, and therefore, amounts to a fresh contract or a novation of contract. The Hon'ble High Court of Bombay held that since the finance made by the creditor to the principal debtor was simply continued by a document renewing the contract and that the guarantee of the surety of this contract being a continuing guarantee, and there being no notice of revocation of such continuing guarantee under section 130 of the Contract Act, the obligation of the surety clearly continued to operate. There is no discharge either under section 133 or section 130 of the Contract Act. In *H.R. Basavaraj(dead) by his LRs. & Ano. Vs. Canara Bank & Ors. (2010) 12 SCC 438*, it was held by the Hon'ble Apex Court that when the agreement clearly shows that the guarantee was to continue to all future transactions, it amounts to a waiver of the rights conferred on the guarantor under Chapter 8 of the Contract Act.

8. In *Sitaram Gupta vs. Punjab National Bank and Ors. (2008) 5 SCC 711* it was held that it was not open to the Appellant therein to revoke the guarantee as he had agreed to treat the guarantee as a continuing one and was bound by the terms and conditions of the said guarantee. It is also held that the Appellant therein cannot claim

the benefit under section 130 of the Contract Act because he had waived the said benefit by entering into the agreement of guarantee with the bank.

9. A reading of clauses 9 and 10 of the deed of guarantee executed by the 4th Respondent, extracted above, would go to show that the 4th Respondent had not expressly exercised her right of revocation under section 130 of the Contract Act and had in fact waived the right to revoke the contract on the grounds of novation. The 4th Respondent has agreed to continue the guarantee irrespective of the subsequent changes that may be made with regard to the credit facility provided to the principal borrower. Under the circumstances, the Ld. Presiding Officer was not justified in exonerating the 4th Respondent/Defendant from the liability to pay the amount in accordance with the letter of guarantee.

In the result, the appeal is allowed and the impugned judgment dismissing the O.A. as regards the 4th Defendant is set aside and the O.A. is allowed as against all the Defendants including the 4th Defendant, making them jointly and severally liable. A fresh Recovery Certificate shall be issued accordingly

The appeal is allowed as above.

Sd/-
Chairperson

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