

**BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI**

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 251/2007

Between

State Bank of India ... Appellant/s
V/s.
M/s Swati Diamonds & Ors. ... Respondent/s
Mr Rony P. J., Advocate for Appellant Bank.
Ms Vaishali Bhilare, Advocate for Respondent No.11.

-: Order dated: 27/06/2023:-

The Appellant State Bank of India the Applicant in the Original Application (O.A.) No. 240 of 2004 on the files of the Debts Recovery Tribunal-II, Mumbai (D.R.T.) is aggrieved by the judgment dated 20/03/2007 delivered by the Ld. Presiding Officer.

2. The O.A. was filed by the Appellant to recover debts due from Defendants Nos. 1 to 5, who are the Respondents Nos. 1 to 4 herein. They are the borrowers and guarantors. The 1st Respondent/Defendant is a partnership firm of which Respondents Nos. 2 to 5 are the partners. Defendants/Respondents Nos. 6 to 8 are the mortgagors /guarantors. Defendants/Respondents Nos. 9 to 11 are Banks who were the members of the consortium while Defendant No. 12 is sued in his capacity as the owner of the building over which the 1st Defendant has rights comprising of a lien. Defendants Nos. 2 to 7 are related while Defendant No. 8 is a sister concern of the 1st Defendant firm, which provided a corporate

guarantee for the debts availed by the others.

3. Defendant Nos. 2 to 5 as partners of the 1st Defendant firm availed credit facilities and executed several documents about the debts and also provided security by way of the creation of an equitable mortgage by deposit of title deeds of the secured assets by Defendant Nos. 1 and 6 to 8. Documents were also executed hypothecating the current movable assets belonging to the firm.

4. From the Minutes of the Meeting of the consortium held on 30/03/2002, it was agreed between the consortium members comprising of the Appellant and Respondent Nos. 9 to 11 to enhance the limits of the credit facilities granted to the 1st Respondent firm from the Appellant and Respondents 9 and 10 from ₹66 crores to ₹93 crores on certain conditions. The 9th Respondent namely the Allahabad Bank would lend and advance a sum of ₹23 crores. The 11th Respondent Canara Bank agreed to provide ₹5 crores towards the aforesaid enhanced limits. The 1st Respondent agreed to furnish additional securities to cover the enhanced limits and to execute consortium documents and also to obtain and furnish the no objection of the Appellant being the lead Bank of the consortium.

5. However, it is alleged that the 1st Respondent did not provide additional securities as agreed. The no objection of the Appellant for the enhanced limits was also not obtained by the 1st Respondent. Irrespective of the 1st Respondent not complying with the terms, the 11th Respondent advanced ₹5 crores. The 11th Respondent is, therefore, not entitled to include the said amount in the dues of the

consortium payable by the 1st Respondent or claim any charge over the securities of the consortium in respect of the said ₹5 crores.

6. Respondents Nos. 1 to 5 are carrying on the business of manufacturing and export of cut and polished diamonds. They are constituents of the Appellant and Respondents Nos. 9 and 10 since 1981. On or about 25/07/2000, the consortium sanctioned an export packing credit facility of ₹7.90 crores, a post-shipment credit facility of ₹52.10 crores and a post-shipment ad hoc limit of ₹5 crores. Thus, the working capital facilities sanctioned in aggregate were to the tune of ₹65 crores in which the Appellant's share was 52%. The Appellant sanctioned an export packing credit facility of ₹4 crores, a post-shipment credit limit of ₹26.30 crores and a post-shipment ad hoc limit of ₹3.5 crores. Respondents Nos. 1 to 5 executed security documents including supplemental joint deeds of hypothecation, supplemental working capital consortium agreement, and a supplemental deed of guarantee was executed on 01/08/2000.

7. In the O.A., the Appellant had claimed ₹4,41,11,785.37 being dues under the cash credit facility. ₹31,24,85,625.29 was claimed under the post-shipment credit facility. ₹2,27,974.92 was claimed as under overdraft in the current account and ₹74,84,559/- was claimed as dues under unpaid service charges/excess drawing charges/ECGC premia/stock order to charges.

8. On being served with notice Defendants Nos. 1 to 5 and 7 to 10 did not appear. The 6th Defendant and the 11th Defendant Canara

Bank appeared and filed separate written statements. The 6th Defendant contended that the Applicant Bank had misused documents and blank papers were used 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 is further contended by the 6th Defendant that the letter of guarantee was signed upon the oral assurance of the Applicant that the security of the property created by the Defendants would be sufficient to cover the liability. It is also contended that the Bank had varied the terms of the contract without the 6th Defendant's consent. Even the creation of a mortgage is denied by the 6th Defendant.

9. The 11th Respondent had appeared and filed a written statement contending that the Canara Bank was a member of the consortium in favour of which the 1st Respondent had created charge of various movable and immovable properties. The Canara Bank joined the consortium on 05/11/2000. It is contended that upon induction of the Canara Bank as a member of the consortium, it becomes entitled to share the security with the Appellant and Defendants Nos. 9 and 10 on a pari-passu basis. Hence, the 11th Defendant claims its right to be protected.

10. Upon considering the evidence and the rival contentions, the Ld. Presiding Officer concluded that since Defendant Nos. 7 and 8 remained ex parte, there was nothing to disbelieve the documents executed by them about the creation of mortgage and guarantee. Concerning the 6th Defendant the Ld. Presiding Officer observed that the creation of the mortgage stands proven because her title

deeds being in the possession of the Applicant Bank. Concerning the liability of the 6th Defendant as a guarantor, it is observed that the supplemental deed of guarantee purportedly executed by her together with the other guarantors on 01/08/2000 (Exhibit 51) alone is produced and that she has not given any undertaking to be liable as a guarantor and to pay the amount vide the said document. The Ld. Presiding Officer has also found fault with the Applicant for not producing the original letter of guarantee to show that the 6th Defendant is liable also as a guarantor. Hence the liability of the 6th Defendant is restricted to the mortgage alone.

11. Concerning the contentions raised by the 11th Defendant Canara Bank, the Ld. Presiding Officer has observed thus:

“... the Canara Bank was inducted as consortium member and that the agreement to share the security was at the executory stage than the executed one...” (sic).

12. It is also observed that the 11th Defendant was made a member of the consortium but pari-passu was not created except over current assets. Though the Ld. Presiding Officer has observed that becoming a consortium member does not by itself entitle the 11th Defendant to pari-passu charge over then available security, it is concluded that the agreement equally applies not only to parties thereto but also to those members who are subsequently inducted in the consortium. In para 15, it is observed thus:

“... for entitlement on pari-passu basis, to the new member of the security unequivocal intention would be necessary which is not there in this case. For these reasons, I do not feel hesitated rejecting defendant No. 11's contentious issue.” (sic)

13. Nevertheless, the Ld. PO in para 16 he has observed thus:

“... the pari-passu over current assets was already considered in favour 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 overall the property is defendant No. 11 for an ad hoc limit of ₹ 5 crores. The defendant No. 11 would this be entitled to restricted relief.”
(sic)

14. Concerning the claim, the Ld. Presiding Officer allowed the claim under the first three heads. The 4th item about unpaid service charges; amounting to ₹74,84,559/-was, however, disallowed for the reason that there was not an iota of evidence on which this claim can stand.

15. The Appellant is aggrieved and hence, in appeal. In the appeal also the 11th Respondent alone appeared to contest. The rest of the Respondents remained ex parte. Heard the Ld. Counsel appearing for the Appellant and the Ld. Counsel appearing for the 11th Respondent Canara Bank. Records perused.

16. The first point that would arise for consideration in this appeal is whether the Ld. Presiding Officer was justified in not granting the complete relief sought by the Applicant against the 6th Defendant. The reasons stated for declining the relief sought against the 6th Defendant is that the supplement deed of guarantee purportedly executed by her and other guarantors on 01/08/2000 produced evidence as Exhibit 51 does not indicate that she has given any undertaking to liable as a guarantor and that the basic clauses showing that the parties had stood as guarantors are absent. In the written statement filed by Defendant No. 6, it is admitted that she has signed documents purported to be guarantee upon the oral assurance of the Applicant that the property which was

supposed to have been secured by Defendant No.1 and other Defendants would be sufficient to cover the alleged liability of the first Defendant and that the procurement of guarantee mere formality. This is an admission on the part of the 6th Defendant that she has executed the deed of guarantee. The second supplemental deed of guarantee executed on 01/08/2000 is signed by Respondents Nos. 1 to 8. Defendant No. 6 is the signatory number 5 in the said deed. The clauses on page 6 of the agreement read thus:

“AND WHEREAS on of the conditions specified and contained in the said agreement of loan is that the borrower shall procure and furnish to the Lead Bank a guarantee guaranteeing due payment by the borrower of the said principal sum (not exceeding ₹65,00,00,000/- (Rupees Sixty Five Crores Only) together with interest, costs, charges, expenses and/or other money due to the Lead Bank in respect of or under the above-mentioned credit facilities or any of them on demand by the Lead Bank.

AND WHEREAS the Bank has at the request of the borrower and the guarantors agreed to increase the aggregate sum limit of the aforesaid credit facilities from ₹29,83,00,000/- (Rupees Twenty Nine Crores Eighty Three Lakhs Only) on the condition that the guarantors extend their liability under the principal deed of guarantee from ₹29,83,00,000/- to ₹65,00,00,000/- which the guarantors have agreed so to do.”

17. It is also stated in the said agreement that the principal deed of guarantee has been varied and shall remain in full force. These wordings are sufficient to prove that the 6th Defendant had voluntarily extended the guarantee deed. The non-production of the principal deed of guarantee is, therefore, of no consequence and the Ld. Presiding Officer was not justified in exonerating the 6th Defendant of her liability as a guarantor. The impugned judgment, therefore, needs modification on this point.

18. The next point that arises for consideration is whether the Ld. Presiding Officer was justified in declining relief with regarding the fourth item of the claim ₹74,84,559/- under unpaid service charges/ excess drawing charges/ECGC premia/ stock audit charges on the ground that the statement of account evidencing such claim is not produced. Exhibit 56 is an acknowledgement made by Defendant Nos. 1 to 5 on 30/01/2004 acknowledges the liability mentioned as item 4. It is pertinent to note that none of the borrowers have appeared to contest the claim. Admitted facts need not be proved when the claim put forth by the Appellant has been uncontroverted, it amounts to an admission of the liability. Hence, the Ld. Presiding Officer was not justified in non-suiting the Appellant with regard to the claim of item No.4. The second point would also go in favour of the Appellant.

19. The third and last point that arises for consideration is whether the Ld. Presiding Officer was justified in granting the 11th Defendant a pari- passu charge over the entire mortgaged properties to the extent of ₹5 crores. The Ld. Presiding Officer had in the earlier part of the impugned judgment agreed with the Applicant that for entitlement on a pari-passu basis, to the new member of the security, a clear and unequivocal intention would be necessary which is not there in this case and therefore, he does not feel hesitant in rejecting the contention of the 11th Defendant. Nevertheless in the operative portion of the judgment, the Ld. Presiding Officer has granted a decree in favour of the 11th Defendant as well.

20. It is pertinent to note that the 11th Defendant joined the consortium only subsequent to the creation of the mortgage. The additional loan of ₹5 crores was to be granted to the borrowers on certain conditions. Defendant Nos. 1 to 8 were liable to furnish additional securities to the extent of ₹5 crores and also to obtain a no objection certificate from the Appellant as recorded in the Minutes of the Meeting of the Consortium held on 30/03/2002. The said conditions were never fulfilled. Under the circumstances, the Ld. Presiding Officer was not justified in granting a pari-passu charge to the 11th Defendant with regard to the properties mortgaged earlier in favour of the consortium. Judgment needs to be modified to that extent as well.

Resultantly, the appeal is allowed and the impugned judgment of the D.R.T. dated 20/03/2007 in O.A. No. 240 of 2004 is modified to the extent that Defendants Nos. 1 to 8 shall also pay to the Applicant 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 with effect from the date of filing of the O.A. till realisation and the said amount shall be realised 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. The 11th Defendant is not entitled to any pari-passu charge over the mortgaged assets. A modified Recovery Certificate shall be issued in the above terms.

Sd/-
Chairperson