

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 37/2008

Between

Ross Deas & Anr. ... Appellant/s
V/s.

Central Bank of India ... Respondent/s

Mr Dinesh Purandare along with Mr Vinay Deshpande and Mr Rupak Sawangikar, i/b M/s. V. Deshpande & Co., Advocate for Appellants.
Mr R. K. Jha, i/b M/s R. K. Jha & Associates, Advocate for Respondent Bank.

Ms Swarnima Singh, Law Officer, for Respondent Bank, is also present.

:- Order dated: 14/09/2023:-

The Appellants are in appeal impugning the judgment and order dated 18/07/2007 in Original Application (O.A.) No. 2035 of 1999 on the files of the Debts Recovery Tribunal-I, Mumbai (D.R.T.). The Appellants were defendants Nos. 3 and 4 in the O.A. impleaded as the guarantors to the first defendant principal borrower namely M/s Rossell Finance Ltd., of which they were the erstwhile directors.

2. The 1st defendant company has gone into liquidation and is represented by the Official Liquidator, High Court of Bombay. The Appellants had in their written statement filed before the D.R.T. contended that in 1994, following negotiations between the 2nd defendant Mr. Y. K. Modi, the promoter, director and vice-chairman of the 1st defendant company and defendants Nos. 3 and 4 they had

sold their shareholding to the 2nd defendant and resigned from the Board of the company. The 2nd defendant had assured that the guarantees given by defendants Nos. 3 and 4 would be substituted and replaced and they would be released from their obligations of guarantees given to the bank. It was further contended that vide letter dated 06/02/1995 the respondent Central Bank of India was informed that defendant Nos. 3 and 4 have withdrawn the guarantee given by them to the bank. In response to that, vide letter dated 24/02/1995, the bank wrote to these defendants that their guarantees would be replaced after consulting with the consortium. defendant No. 2 executed a fresh guarantee on 03/08/1995 in consequent to which defendant Nos. 3 and 4 stood discharged.

3. After considering the material on record, the Ld. Presiding Officer observed that the Applicant bank had in their letter dated 24/02/1995 stated that the guarantee of defendants 3 and 4 would continue till an alternate arrangement is made by the company to the satisfaction of the consortium. According to the Ld. P.O., the letter would indicate that it was within the discretion of the Applicant bank to discharge or not to discharge the guarantee provided by defendant Nos. 3 and 4. As per the guarantee agreement the Applicant bank was also entitled to take additional guarantees and on providing such additional guarantees the earlier guarantees would not get automatically discharged. Under the circumstances, the Ld. Presiding Officer allowed the O.A., making defendants Nos. 1 to 4 jointly and severally liable to pay the decretal amount to the Applicant bank. The Appellants are aggrieved and hence in appeal.

4. Heard Mr Dinesh Purandare, the Ld. Counsel appearing for the Appellants and Mr R. K. Jha, the Ld. Counsel appearing for the Respondent bank. Documents perused.

5. The only contention that requires consideration in this appeal is whether the Appellants stood discharged from their liability as guarantors to the loan availed by the principal debtor company which is under the liquidation. Mr Purandare draws the attention of this Tribunal to Exhibit-G letter dated 23/04/1999 issued to defendant Nos. 1 and 2 by Advocates under instructions from the respondent bank. This is a demand notice calling upon the defendant Nos. 1 and 2 to pay a sum of ₹35,97,749.88 together with interest thereon at the rate of 17.85% per annum with quarterly rests with effect from 01/01/1999. That letter specifically mentions the following:

“Our clients further say that, previously Mr. Ross Deas and Ms. Lynn Deas were in their individual capacities, the personal guarantors for the said credit facilities. However, consequent upon the retirement from No. 1 of you, the said personal guarantors have been replaced by the personal guarantee of No. 2 of you.”

6. According to Mr. Purandare for the Appellants, the above-cited recital is a clear admission on the part of the bank that the Appellants have been discharged from their liability as guarantors. The Ld. Counsel also points out to another letter dated 24/07/1999 by the Advocates for the bank addressed to the 1st defendant alone, claiming the amount from it, and mentioning that the Appellants are guarantors to the debt availed by the 1st defendant company. It is also pointed out that, none of the other consortium members have proceeded to claim any amount from the Appellants as guarantors. Exhibit 38 dated

25/05/1991 is the guarantee deed executed by the Appellants and Exhibit 39 dated 03/08/1995 is the guarantee deed executed by the 2nd defendant substituting the earlier guarantee executed by the Appellants.

7. Going through the materials placed, it is adequately clear that with the consent of the bank, the guarantee submitted by the Appellants was substituted with the guarantee submitted by the 2nd defendant. The Appellants had resigned from the directorship of the 1st defendant company and had sold their shares in the company to the 2nd defendant. Considering the notice that was issued on behalf of the bank against defendants Nos. 1 and 2 containing a categorical admission on the part of the bank that their guarantee is substituted with and has been replaced by the guarantee submitted by the 2nd defendant indicates that the bank had accepted the substitution of guarantee. The Ld. Presiding Officer was, therefore, not justified in decreeing the O.A. jointly and severally against the defendants including the Appellants.

8. It is also pertinent to note that the 1st defendant company had gone into liquidation and an Official Liquidator was appointed in the company proceedings. The Appellant had filed a Writ Petition No. 9304/2014 and the same was disposed of on 06/01/2020. In that order, the Hon'ble High Court of Bombay has observed that a report was submitted by the Official Liquidator on 04/07/2019 informing that a sum of ₹9,09,95,492.73 is lying with the Official Liquidator to the account of the company in liquidation and that the liquidator has

paid to the Central Bank of India a sum of ₹41,30,765 i.e., the decretal sum. The report of the Official Liquidator also informs that 27 claims totaling ₹47829,140/- have been received. The Official Liquidator has also provided information that the claim of the Central Bank of India was ₹4,34,21,760/- from out of the total claim of ₹4,78,29,140/- lodged with the Official Liquidator which would mean that the claim put forth by the rest of the claimants was only ₹45 lakhs. The Hon'ble High Court has expressed surprise that the Central Bank of India has not filed an application before the Company Judge putting forth a claim against the Company in liquidation, with regard to the amount to be released to them.

9. The Respondent bank had in the Company Application No. 246 of 2014 filed by the bank before the Company Court claimed a sum of ₹4,08,64,047/- from the Official Liquidator as the decretal amount in O.A. No. 2035 of 1999. The said application was filed only on 26/02/2014. On 15/12/2014, the Hon'ble High Court of Bombay passed an order on Company Application No. 246 of 2014 referred to above. That order reads thus:

“The learned Advocate for the Applicant informs the Court that the Applicant is not desirous of pressing the reliefs sought in the above application and is willing to accept an amount of ₹ 40,00,000/- as adjudicated by the Official Liquidator. In view thereof, the above Company Application is dismissed and the Official Liquidator is directed to pay an amount of ₹ 40,00,000/- to the Applicant within two weeks from today.”

10. In the Writ Petition No. 9304/2014 filed by the Appellants which is already referred to above, the bank had filed an affidavit stating that the bank has received only a sum of ₹40 lakhs from the

Official Liquidator and that they are entitled to recover a total sum of ₹6,28,42,603/-together with interest from the borrower company and the guarantors. A status report was filed by the Official Liquidator in the aforesaid Writ in which, it is stated that a sum of ₹9,09,95,492.73 is still lying to the credit of the Company in Liquidation as of 04/07/2019. Under the circumstances, if at all the Respondent bank wants to proceed against the 1st Respondent company, it is at liberty to realise the entire amount from out of the amount still lying in deposit with the Official Liquidator.

11. There is absolutely no necessity for the bank to proceed against the Appellants who have already been discharged as guarantors of the debt incurred by the company in liquidation.

In view of the above discussion, the appeal is allowed in the impugned judgment in order of the D.R.T. dated 18/07/2007 as regards defendants 3 and 4 is set aside and they are discharged from the debt and the liability of the 1st defendant company. The Recovery Certificate issued shall be modified accordingly.

Sd/-
Chairperson

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