State Bank of Bikaner & Jaipur

Vs

Ballabh Das & Co. and Others

Civil Appeals Nos. 5069-70 of 1999

15.09.1999

JUDGMENT

G. T. NANAVATI, J. –

1. Leave granted Heard learned counsel for the parties.

2. The appellant Bank filed two civil suits - one against Ballabh Das & Sons and its partners and the other against Ballabh Das & Co. and its partners - in the Court of the District Judge at Jaipur for recovery of its dues of Rs. 75,46,921 and Rs. 56,36,200 on 24-3-1983 and 2-7-1984 respectively. During the pendency of the suits, Recovery of Debts Due to Banks and Financial Institutions Ordinance, 1993 was promulgated by the President of India on 24-6-1993. It was replaced by the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short referred to as "the Act"). After the Debts Recovery Tribunal was constituted under the Act at Jaipur, the appellants made two applications on 20-9-1994 to the Court for getting the two suits transferred to the Debts Recovery Tribunal. The Court by two separate orders allowed the applications and directed transfer of those suits to the Debts Recovery Tribunal at Jaipur but retained the counter-claim filed by the respondents in Civil Suit No. 152 of 1988.

3. Feeling aggrieved by those orders the respondents filed two revisions applications (Nos. 669 and 670 of 1995) before the Rajasthan High Court. The High Court held that the question whether the amounts claimed in the suits are legally recoverable or not is a question of fact and can be adjudicated only after recording evidence. It further held that whether the amounts claimed fall within the meaning of the term "debt" as defined by Section 2(g) of the Act is also a question of fact and till those facts are decided by the Court the provisions of the Act cannot be said to have become applicable to the suits on and from the date on which the Tribunal at Jaipur was established. It also held that Civil Suit No. 152 of 1988 in which a counter-claim has been filed could not have been transferred to the Tribunal, as no application was made under Order 8 Rule 6-C of the Code of Civil Procedure for exclusion of the counter-claim and also because no such application could be made after framing of issues. Taking this view the High Court allowed both the revision applications and by a common judgment set aside the orders passed by the District Court.

4. Aggrieved by the judgment of the High Court the appellant Bank has filed these appeals. It was contended by Mr. Dave, learned Senior Counsel for the Bank that the High Court has wrongly criticised the District Court by observing that it had overlooked the provisions of the law. In his submission it is really the High Court which has overlooked the relevant provisions of the Act and erroneously allowed the revision applications. He submitted that the suits being proceedings for recovery of debts alleged to be due, the civil court ceased to have any jurisdiction to deal with them on merits.

5. It is not in dispute that the respondents, under the export credit facility with the appellant Bank, were obtaining advances from the appellant Bank from time to time against pre-shipment and post-shipment exports of precious stones, jewellery, diamonds etc. It is also not in dispute that there was non-payment to the Bank by the foreign buyers of the bills mentioned in the two suits. The defence of the respondents is that under the insurance cover obtained at the instance of the Bank from the Export Credit Guarantee Corporation, the Bank is insured against any loss on account of non-realisation of amounts from foreign buyers and on delivery by the respondents to the Bank of documents of export of goods for which the credit was given or advances were made are to be deemed to be payments by the respondents to the Bank. The respondents had delivered the documents in respect of the suit transactions to the Bank and, therefore, the amounts mentioned in those documents should be deemed to have been paid to the Bank. But the fact that the amounts claimed under the two suits have not been received by the Bank and are still outstanding is not in dispute as can be noticed from the admissions made by the respondents in paras 4 and 5 of the counter-affidavit.

6. The question which arises for consideration is whether in view of these facts the amounts claimed by the Bank in the suits can be said to be "debt" due and recoverable by the Bank from the respondents. Section 2(9) of the Act defines the term "debt" as under :

> "2. (g) 'debt' means any liability (inclusive of interest) which is alleged as due from any person by a bank ..., in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on, the date of the application;"

Section 17 of the Act provides that a Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 18 has created a bar that no court or other authority can thereafter exercise any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17. In respect of pending cases Section 31 provides as under :

"31. Transfer of pending cases. - (1) Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal :

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any court.

> (2) Where any suit or other proceeding stands transferred from any court to a Tribunal under sub-section (1), -
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> (a) the court shall, as soon as may be after such transfer, forward the records of such suit or other proceeding to the Tribunal; and
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> (b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an

application made under Section 19 from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit."

Section 34 gives the Act an overriding effect by enacting that the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law.

7. According to the definition, the term "debt" means liability which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions. It should have arisen during the a course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force. The liability to be discharged may be in cash or otherwise. It would be immaterial whether the liability is secured or unsecured or whether it is payable under a decree or an order of any civil court or otherwise. However, it should be subsisting and legally recoverable on the date on which proceedings are initiated for recovering the same.

8. The important words in the definition "alleged as due" have been overlooked by the High Court and, therefore, it has erroneously held that unless the amounts claimed by the Bank are determined or decided by a competent forum they cannot be said to be due and would not amount to "debt" under the Act. What was necessary for the High Court to consider was whether the Bank has alleged in the suits that the amounts are due to the Bank from the respondents, that the liability of the respondents has arisen during the course of their business activity, that the said liability is still subsisting and legally recoverable.

9. The High Court should have appreciated that the Bank has alleged in the suits/plaints that the respondents had borrowed money for the goods exported under the bills referred to in the sits and that the amounts payable under the bills have not been paid by the foreign buyer to the Bank under the agreement between the parties and, therefore, they have remained outstanding. This is the cause of action disclosed in the plaints. Obviously, if this cause of action had arisen after the establishment of the Tribunal at Jaipur, then in that case the Bank would have been required to file an application for recovery of the outstanding dues before the Tribunal and not in the civil court and the bar created under Section 18 would have also applied. As the suits were filed by the Bank before establishment of the Tribunal and were pending in the civil court when the Tribunal came to be established under the Act, Section 31 became applicable to those suits and they shall have to be treated as transferred to the Tribunal on and from the date the Tribunal was established. Section 31 of the Act makes it clear that the transfer is automatic because of the operation of law and, therefore, the Bank was really not required to file applications. Those applications should have been really treated as applications for forwarding the records of the suits to the Tribunal. In our opinion, the trial court rightly understood the correct position of law and passed correct orders on those applications. The High Court took an erroneous view of the law and wrongly set aside the orders passed by the trial court.

10. The High Court also failed to appreciate that the defence raised by the respondents does not prima facie show that the liabilities stood discharged either under the insurance cover/guarantee or otherwise. The defence raised by the respondents is that the insurance cover/guarantee provides that delivery by the exporter to the insured of documents of export of goods for which the credit has been given or advance has been made shall be deemed to be payment by the exporter to the insured and, therefore, when the respondents delivered the export documents to the Bank they should be deemed to have paid the amounts due under those exports to the Bank. This defence can be

considered only for the limited purpose of finding out whether the liability of the respondents was subsisting on the dates on which the suits were filed. Otherwise, it has no relevance for the purpose of deciding the jurisdiction of the forum. The contract of insurance/guarantee is between the Export Credit and Guarantee Corporation of India Ltd. and the appellant Bank and prima facie the term/condition in the said insurance cover/guarantee referred to above is for the benefit of the insurer and not for the benefit of the exporter i.e. the respondents. It does not absolve the respondents of the liability to repay the amounts borrowed for the purpose of making exports if the foreign buyer of those goods does not make payment to the Bank of the amount payable in respect of those goods. Though the insurer/guarantor under the insurance/guarantee possibly would stand discharged from its liability to the insured on the exporters delivering the documents of export of goods to the insured, prima facie, the principal debtor would still remain subsisting. Thus, even this prerequisite for the liability to be called a debt as contemplated by the Act having been satisfied the suits filed by the Bank should have been treated by the High Court as proceedings for recovery of the debts.

11. For the reasons stated above, we are of the view that the High Court was wrong in holding that the applications made by the Bank were premature and till the Court decides that the amounts are still due and payable to the Bank they cannot be treated as suits for recovery of the debts as contemplated by the Act and, therefore, they are not required to be transferred to the Tribunal. We, therefore, allow these appeals, set aside the judgment and order passed by the High Court and restore the orders passed by the trial court.