SUPREME COURT OF INDIA

H.B. Basavaraj (Dead) by LRs.

Vs.

Canara Bank

C.A.No.233 of 2003

(Tarun Chatterjee and Aftab Alam JJ.)

28.10.2009

JUDGMENT

TARUN CHATTERJEE, J.

1. This appeal is directed against the judgment and final order dated 29th of September, 2000 of the High Court of Karnataka at Bangalore in R.F.A No. 205/1995 whereby, the High Court had dismissed the appeal filed by the appellants herein.

2. The relevant facts, which would assist us in appreciating the controversy involved, are narrated in a nutshell, which are as follows:

Lokashikshana Trust (LST) was a public Trust registered under the Bombay Public Trust Act, 1950 which was engaged in the publication of a Kannada daily "Samyukta Karnataka" and some other periodicals. In 1974, the Board of Trustees entered into an agreement with M/s Karnataka Patrika Pvt. Ltd. (hereinafter referred to as "the KPP") for the. transfer of publication and printing rights and machineries as also to create a lease in the buildings owned by the Trust. Some interested persons filed a suit being O.S. No. 4/1977 before the Principal District Judge, Dharwad, praying for removal of trustees, scheme for management of the trust, etc. While this suit was pending, the KPP entered into an agreement with M/s. Jaya Karnataka. News and Printers Pvt. Ltd. - appellant No. 2 (hereinafter referred to as "the JKNP") for transfer of all its rights, interest and liabilities. There was a loan transaction between JKNP and the respondent bank whereby a loan of Rs. 15 lakhs was sanctioned to the former at an interest of 15% p.a. by open cash credit compounded quarterly. Appellant No. 1 along with other office-bearers of the said company allegedly executed a demand note. On the same day, JKNP through its Executive Director requested for an Over draft facility of Rs. 5 lakhs which was granted on an on-demand promissory note with an interest of 15% p.a. compounded quarterly. This loan was secured by book debts and appellant No. 1 Basavaraj (since deceased) along with the Executive Director of JKNP also executed a hypothecation agreement to provide collateral security to the bank. Subsequently, JKNP and its Executive Director executed a pro-note for a term loan of Rs. 2,86,000/- at the same interest rate as before. The appellants herein also executed an agreement of guarantee to the tune of Rs. 13 lakhs with a maximum of Rs. 30 lakhs as seen from Exhibit P-16. JKNP became a public limited company on 28th of September 1978. The respondent bank filed a suit being O.S. No 119/1984 against the appellants for recovery of the loan amount. Appellants contested the suit and denied material allegations. O.S. No. 119/1984 was decreed by the Principal Civil Judge, Hubli at the Trial Court level on 1st of August 1994 directing

the appellant to pay Rs. 19,97,839.51 with future interest at 17% p.a. and other relief's and costs.

Meanwhile, an interim order was passed in O.S. No. 4/1977 appointing JKNP as the receiver of the properties in its possession subject to the conditions mentioned in the order. On 9th of September, 1980, the Charity Commissioner, Belgaum was appointed the new receiver. Again the Court at Dharwad relieved the Charity Commissioner of receivership of the property and instead appointed a District Judge to be the receiver and manage the Trust publication and moveable properties. Meanwhile, the Governor of Karnataka had issued the Lokashikshana Trust (Taking over of management) Ordinance in 1991 which was later replaced by the Lokashikshana Trust (Taking over of management) Act (hereinafter referred to as 'the LST Act"). The LST Act was aimed at taking over the management of the Trust by the State Government due to the prolonged litigation pending' before the Courts at first for two years and extendable to the extent of five years. Accordingly, the trust properties came to be vested in the Administrator appointed by the Government. This action of the Government was validated by a Division Bench of the High Court of Karnataka in *Shri R.K. Joshi and Ors. v. State of Karnataka* 1984 (1) KLJ 158 which held that the management of the public trust was a matter of public concern and hence within the ambit of the State Government's powers. Only the explanation to Section 2(c) of the LST Act was declared to be invalid in as much as the same related to the properties sold by the Trust to KPP and which were in the possession of the receiver and, hence, arbitrary. The suits in the High Court were related to three different loan transactions that had taken place between the respondent Banks and the appellants between 1977 and 1981. The first out of these have been taken by the KPP in 1977, the second by JKNP in 1978 and the third loan was taken by the administrator appointed by the Government under the LST Act. The subject matter of these appeals has been to decide as to who should be liable to pay the loan amounts. O.S. No. 4/1977 was dismissed by the District Court, Dharwad. The first set of appeals in the High Court had been against the decree of the Trial Court, which was passed against KPP and JKNP regarding a loan of Rs. 90,0007/- from Syndicate Bank where three different appeals were filed by KPP, JKNP and the Bank separately. The issues gone into by the High Court were multifarious and not required to be delved into at this point of time.

3. We have heard the learned Counsel appearing on behalf of the parties and examined the materials on record. The issues which we have framed to deal with while disposing of this appeal are listed as follows:

i. Whether the deceased surety and his Legal Representatives are liable to repay the disputed loan amount? ii. Whether the conduct of parties amounts to novation of the contract between the parties?

iii. Whether the Lokashikshana trust alone is responsible to repay the disputed loan amount being the beneficiary of the same?

iv. Whether the LST having benefited from the loan transaction disputed herein can be estopped from denying its liability?

4. As regards the first issue that is with respect to the liability of the appellant guarantors Basavaraj (since deceased) and his legal heirs, the argument made on behalf of the appellants was that the original surety, Basavaraj did not have the chance to verify the documents he had signed at the time of his entering into an agreement to become a surety. It was submitted that the dates mentioned in Exhibits p-19 and p-20 were in fact inserted at a later date after the forms were signed by the surety. The arguments regarding the practice of the banks to make persons sign blank acknowledgments

from beforehand in order to extend the time of limitation at the time of filing of suits seems to be without merit. Even if we acknowledge the fact that banks might be in a dominant position, there was absolutely no evidence to show that the bank had in fact exercised its dominant power to force the surety into entering the contract that he ultimately did. If the appellant had been interested in insisting upon this matter then the least he could have done was to have entered the witness box and facilitated a method of clearing the air about it. Nor was there any explanation adduced at a later stage explaining the reason for the surety not entering evidence on his behalf. In the absence of any conclusive evidence to point to the entering of dates at a later stage, we cannot find any difficulty in rejecting the aforesaid contentions of the appellants.

5. The learned Counsel for the appellants also sought to argue for the discharge of sureties that the agreement executed was between JKNP, KPP and the Bank had the effect of as if sanctioning new loans to JKNP but retaining KPP as the guarantor. In such circumstances, the appellant guarantor cannot be held liable for the loan. But the learned Counsel for the appellants had failed to produce any evidence on behalf of the appellant to satisfy the court in support of his argument. Instead they contended that the bank was in possession of such documents and was suppressing it. It is highly unimaginable that when parties are entering into contracts for the purpose of seriously conducting some businesses, that there would not be multiple copies of the executed agreement or at least one copy with either of the appellants. Thus, this contention of the appellants does not inspire any confidence. We, therefore, find no difficulty in rejecting the same. As the respondent has rightly contended that in view of the waiver of rights by the guarantor, there can be no waiver of liability in exercise of such rights. The observations of this Court in Provash Chandra Dalui v. Biswanath Banerjee: AIR 1989 SC 1834 at Para 21 might be useful to recollect at this point of time. It runs as follows:

The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the reiinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity

6. An examination of the agreement executed between the appellant Basavaraj (since deceased) and the Bank would clearly show it to be one of a continuing guarantee. Section 129 of The Indian Contract Act, 1872 (hereinafter referred to as "the Act") defines a continuing guarantee as "A guarantee which extends to a series of transactions is called a *"continuing guarantee"*." Section 130 of the Act says that *"A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor."* A reading of the agreement clearly shows that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability through a written statement. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the bank and the guarantor, the surety is the principal debtor and his liability would be co-extensive to that of the borrower. Accordingly, the guarantor himself waived off his rights under Chapter VIII of the Act which is conferred on a surety. This Court is in respectful agreement with the decision of Karnataka High Court in the case of *T. Raju Shetty v. Bank of Baroda* : AIR 1992 KARNATAKA 108 whereby the High Court held that in surety agreements, the surety can waive his rights available to him under the various provisions of Chapter VIII of the Act. It is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies.

This can be inferred from a reading of the Halsbury's Laws of England, Vol 8, 3rd Edn. at page 143 which reads as follows:

As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it is shown that such an agreement is in the circumstances of the particular case contrary to public policy.

This principle was reiterated in *Lachoo Mal v. Radhey Shyam* : (1971)1 SCC 619.

7. On the principles of continuing guarantee, the position was cleared by a decision of this Court in *Sita Ram Gupta v. Punjab National Bank and Ors.* : (2008) 5 SCC 711 whereby it was held that it was not open to a party to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. In the present facts and circumstances, we, therefore, do not find any difficulty in affirming the concurrent findings of the High Court and of the trial Court on the point that the agreement executed for the purpose of a continuing liability despite the variation of terms of the contract and in the absence of a specific written document by Basavaraj (since deceased) revoking the guarantee, the guarantee stands and the legal representatives of the deceased are liable to repay the loan.

8. With regard to the second issue, the learned Counsel for the appellants contended that the contract between JKNP, the Bank and the guarantor Basavaraj had been substituted by a fresh contract by which LST was required to liquidate the amount outstanding. The learned Counsel based this on two facts mainly. One was the transfer of the loan accounts from JKNP to LST and the other factor was the deposit of amounts by the receivers appointed by the Court in O.S. No. 4/1977 for liquidation of outstanding amounts of money indeed gives rise to substitution by a new contract. The respondents on the other hand contended that substitution of an old contract by a new one under Section 62 of Act would require the express consent on behalf of both the parties. Now let us examine Section 62 of the Act which reads as follows:

62. Effect of novation, rescission, and alteration of Contract- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

This Section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressd as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in *Scarf v. Jardine* 1882 (7) App. Case. 345:

That there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the

discharge of the old contract.

It might be useful at this juncture to turn to the decision of this Court in *Lata Construction Ltd. v. Dr. Rameshchandra and Anr.* : (2000) 1 SCC 586 whereby this Court held that if the rights under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there was no substitution of contracts and, hence, no novation.

9. From the facts and circumstances of this case, however, we are unable to uphold the contentions of the learned Counsel for the appellant. There was no record to show that there were withdrawals from the loan account of JKNP from which it could be inferred that the Bank had permitted the receivers to withdraw money. We agree with the High Court in recognizing the fact that only a withdrawal from the said loan account would constitute acquiescence on behalf of the bank to a change in the liability by novation. Mere deposit of amounts by a supposed third party towards liquidation of an outstanding amount cannot ipso facto lead to the novation of a contract.

10. The learned Counsel for the appellant further argued that if not a novation, there was at least an alteration in the terms of the original contract when the bank had let the court appointed receivers to deal with the hypothecated property. In fact, the bank had also given another loan against the very same property which had been hypothecated also for the first loan. Alteration or variation in the terms of a contract under Section 62 of the Act implies that both parties have voluntarily agreed to the change in the terms of the agreement. In this case however, as can be gathered from the facts and circumstances of the present case, the Bank never had a say in the matter at all. In fact, it was due to a decree of the Courts that the property in question had been entrusted in the hands of a receiver. The Bank never had, in any of the dealings of its own volition, expressly accepted the change of the hands of the property ownership and thereby accepted a change in the liability. It might also be useful to recognize at this point of time, that the receiver being a public appointed servant cannot bring about a change in the said contract so as to affect the. legal consequences for the borrower or the guarantor. The administrator appointed by the Government had indeed secured a loan towards the facilitation of running of the publications but had not created any new charge on the property.

11. The learned Counsel for the appellants also sought to argue that the machinery hypothecated to the bank on account of the agreement between JKNP and the Bank as security for repayment of the loan was not identifiable specifically on account of lack of evidence. By this, the learned Counsel meant that the list of annexures produced or proved at the trial stage did not mention the list of any specified machinery hypothecated to the bank. The exhibited document marked p-14 clearly shows that there is a list of machinery which stood hypothecated to the bank not only against the initial sum of Rs. 2,86,000/- forwarded to the borrower but also towards any other sum which might have been borrowed by JKNP subject to a limit of Rs. 75,00,000/-. As rightly held by the High Court at present, there is no need to look into the question as to which of the machineries were specifically hypothecated to the Bank. But the facts in this case are enough to show that a charge was in fact created on the said machinery by JKNP and which had reverted back to the original owner LST in the chain of circumstances. Nevertheless there is enough evidence on record to show that there was indeed a hypothecation of the said machinery. Hence, we find no difficulty in rejecting the argument of the appellant. Accordingly, we affirm the decision of the High Court as the plea of JKNP regarding the novation of a contract was found to be unsustainable and, therefore, the liability of LST to pay the amount involved in the suit would not stand either except to the extent that LST

holds any of the hypothecated machineries.

12. The learned Counsel for the appellant submitted that JKNP was deprived of the possession, management and control of the suit property by an interim order of the court passed in OS No. 4/1977 and never regained the same. It was further contended that the loan obtained by the appellant was for and on behalf of the trust and, hence, JKNP can not be held liable for repayment of the same. There is no doubt that LST being the beneficiary of the loan is liable to repay the loan amount under Section 70 of the Act; but the question here is whether it is alone responsible to pay the same. The Courts below held that LST was liable for payment of the suit claim, but the learned Counsel for respondent claimed that once take-over of the trust property was declared invalid, any liabilities incurred in the intervening period of time including actions by the State would also be unenforceable against it: However, the High Court failed to consider that LST was liable to repay the loan on the principle of Section 70 of the Contract Act inasmuch as it was LST who had been benefited from the loan, which JKNP had secured. Section 70 of the Act reads as follows:

70. Obligation of person enjoying benefit of non-gratuitous act- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

We, therefore, agree with the views expressed by the trial Court and disapprove the finding of the High Court on this count. The Board of Trustees was competent to take any loan, which would be considered to be loan taken by the Trust. In such a case, any loan taken by administrator appointed by the State shall also be deemed as loan taken by the trust and, hence, the trust would be liable to repay the loan. At this juncture, it would be pertinent to observe that we find no rationale applicable to this case in the cases referred to us by the learned Counsel for the appellant at the bar namely *Satyabrata Ghose v. Muneeram Bangur & Co.* 1954 SCR 310 which deals with the doctrine of frustration and the scope of Section 56 of the Act as well as 'impossible contracts' and also in *Indian Finance Corporation of India Ltd. v. Cannanore Weaving and Spinning Mills Ltd.*: 2002(5) SCC 54 at page 71 (Paras 28 and 29) which talk about the meaning of a written covenant to be drawn from the exact words used and where such promised undertaken are found to be impossible to perform at a subsequent period of time. This Court finds no applicability of the rationale of above mentioned cases to the present facts at hand.

13. The fourth and final issue that needs to be decided is the question as to whether LST having benefited from the loan transactions and being the ultimate beneficiary can be estopped from denying its liability. This question, of course, is intricately linked to the previous. But first, we have to determine the concept of estoppel for the purpose of a fruitful discussion. In general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is, however, only applicable in cases where the other party has changed his position relying upon the representation thereby made. As stated by Lord Penman, in Pickard v. Sears 6 Ad. & E. 469 at Page 474 and discussed in B.L. Shreedhar v. K.M. Munireddy (dead) and Ors.: (2003) 2 SCC 355 estoppel said to be based on the maxim, *allegans contrarir non est audiendus* (a party is not to be heard to allege the contrary) and is that species of presumption *juries et de jure* (absolute or

conclusive or irrebutable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done; it is in truth a kind of *argumentum ad hominem*. Estoppel is a complex legal notion, involving a combination of several essential elements, namely, statement to be acted upon, acting on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the -constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified.

14. In the present case, the Bank has granted the loan for proper functioning of the trust and on hypothecation of the properties of the trust itself. From the very beginning, all the transactions which had been entered into had clearly been for the sake of the running of the publications of the "Samyukta Karnataka" and other periodicals like the "Kasturi". In fact, first KPP and then JKNP, both private limited companies were formed for the sole purpose of the management of the running of the business of LST. These companies had been formed because LST was running losses and unable to properly manage its affairs. Even the appointment of receivers and the subsequent transactions entered into by the administrators appointed under the LST Act had been for the purpose of furthering the business concerns of LST itself. It would be useful to refer in this connection to the case of Depuru Veeraraghava Reddi v. Depuru Kamalamma AIR 1951 Mad. 403 where Vishwanatha Sastri, J. (as His Lordship then was) observed:

An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist and be taken away but for that doctrine.

15. In S. Shanmugam Pillai v. K. Shanmugam Piilai : AIR 1972 SC 2069 it was observed that there are three classes of estoppels that may arise for consideration; being: (1) that which is embodied in Section 115 of the Evidence Act, (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction, and (3) ratification i.e.. agreeing to abide by the transaction. It might be said that the action of the trust falls under the third category whereby it ratified all actions taken by others and benefiting from the same. Hence, the trust being the sole beneficiary is not only liable for the repayment but is also estopped from denying its liability under the contract.

16. In the light of the afore-mentioned reasons, the appeal is allowed and the judgment of the High Court is set aside and that of trial court is restored. There will be no order as to costs.