SUPREME COURT OF INDIA

H.D.F.C.

Vs.

Gautam Kumar Nag

C.A.No.137 of 2007

(Aftab Alam and Ranjana Prakash Desai JJ.)

20.01.2012

JUDGMENT

AFTAB ALAM, J.

1. This appeal is directed against the judgment and order dated August 9, 2005, of the Delhi High Court by which it allowed the appeals of the two respondents (defendant Nos.2 and 3 respectively before the trial court), set aside the judgment and decree passed by the trial court and permitted the appellants to file their written statements within four weeks from the date of the judgment, directing further that the trial court would then proceed with the suit and dispose it of in accordance with law.

2. The appellant M/s. Housing Development and Finance Corporation (in short HDFC) instituted a suit under Order XXXVII of the Code of Civil Procedure, 1908, for realisation of its dues against defendant No.1 (the borrower; not before this Court) and the two respondents (defendant Nos.2 3) who were the guarantors to the loan. According to the case of the appellant-plaintiff, defendant No.1 who was the owner of a plot of land approached the appellant-plaintiff for a loan for constructing a house on the plot. The loan was sanctioned on October 29, 1997, and on December 9, 1997, defendant No.1 executed the Loan Agreement and a promissory note in favour of the appellant. In addition, defendant No.1 also created an equitable mortgage in favour of the plaintiff by depositing the title deeds of the plot in question. The other two defendants, respondents before this Court, stood guarantee for repayment of the loan and executed the letters of guarantee on December 9, 1997. On the execution of the necessary documents the loan was disbursed to defendant No.1 in two instalments.

3. The loan amount, along with interest at the rate of 15% per annum was to be repaid in equalised monthly instalments over a period of 180 months and in case of default, according to the terms of the loan, the outstanding would attract additional interest @ 18% per annum.

4. The defendants defaulted in payment of the EMIs and as a result, a large sum was outstanding against them. The defendants did not pay the instalments despite letters and reminders. Hence, the plaintiff invoked the guarantees vide letter dated October 22, 1998, and intimated the two respondents that in case of failure to make the payment, legal proceedings would be instituted against them. Despite the aforesaid letter and legal notices sent on behalf of the appellant, the defendants did not pay the outstanding amount of Rs.4,37,350/-, and the plaintiff was thus left with no option but to institute the suit for realisation of its dues.

5. Defendant No.1 did not appear in the suit despite notice. The two defendants-respondents, however, appeared before the trial court and filed separate applications under Order XXXVII Rule 3 sub-rule (5) of the Code of Civil Procedure for permission to defend the suit.

6. The defendants' applications were based on a number of grounds but we may only advert to the one that seems to have weighed with the High Court. It was contended on behalf of the respondents that since the plaintiff-appellant had got a promissory note executed in its favour by the borrower- defendant No.1 and had further made the borrower create an equitable mortgage in its favour by deposit of title deeds, they would be absolved of their liability in terms of Section 139 of the Contract Act. According to the respondents, their plea gave rise to a triable issue and they, accordingly, sought permission to file their written statements and contest the suit. The trial court by its judgment and order examined all the pleas, including the one based on Section 139 of the Contract Act and found and held that none of the pleas raised by the defendants gave rise to any substantial defence against the claim of the plaintiff. Accordingly, it dismissed the petitions filed by the defendants-respondents by order dated April 29, 2005, and proceeded to decree the suit of the appellant-plaintiff for a sum of Rs.4,54,669/- along with cost and pendente lite and future interest @ 10% per annum on the decretal amount from the date of filing of the suit till the date of realization.

7. In appeal the Delhi High Court, as noted above, set aside the order and decree passed by the trial court and directed it to allow the defendants- respondents to file their written statement and proceed to try the suit from that stage. The High Court

noted that relying upon Section 139 of the Contract Act, a contention was raised by the respondents that for recovery of its loan from defendant No.1, the principal borrower, the plaintiff should have taken recourse first by either seeking to give effect to the promissory note or by enforcing the equitable mortgage. Neither of these remedies which were open to the plaintiff were taken recourse to and the recovery was sought to be made straightaway from the appellants. The High Court further held that the trial Judge fell into error in holding that Section 139 of the Contract Act had no application to the facts of the case. According to the High Court, this was beyond the scope of deciding an application for leave to defend. The High Court observed that the question was not about the correctness or otherwise of the defence raised by the appellants and what was required to be looked into by the trial Judge was whether a triable issue was made out or not. If a triable issue was made out, then leave to defend ought to have been granted and thereafter the defence raised by the appellants could have been adjudicated on merits. The correctness of the defence raised by the defendants could not have been looked into by the trial Judge at the time of deciding the application for leave to defend. In support of its view, the High Court relied upon a decision of this Court in M/s Mechelec Engineers Manufacturers v. M/s Basic Equipment Corporation, (1976) 4 SCC 687.

8. In our view, the High Court was completely wrong in holding that the respondents were able to make out a triable issue on the basis of Section 139 of the Contract Act. It is well established that the liability of the guarantor is equal to and co-extensive with the borrower and it is highly doubtful that the guarantor can avoid his liability simply on the basis of the promissory note made out or an equitable mortgage created by the borrower in favour of the lender. However, in the facts of this case, this question does not even arise. A reference to the deed of guarantee executed by the two respondents would have made the position completely clear but unfortunately the attention of the High Court was not drawn to the relevant clauses in the deed of guarantee.

9. The two respondents executed identical deeds of guarantee of which clauses (2) and (3) read as follows:-

> (2) I hereby accord my consent to the terms of the said Loan Agreement and/or any instrument or instruments that may hereafter be executed by the Borrower/s in your favour as aforesaid, being by mutual consent between you and him/them in any respect varied or modified without requiring my consent or approval thereto and I agree that my liability under this Guarantee shall in no manner be affected by such variations and modifications and I

> expressly give up all my rights as surety under the provisions of the Indian Contract Act, 1872 in that behalf.
>
> (3) You shall have the fullest liberty without in any way affecting this Guarantee and discharging me from my liability thereunder to postpone for any time or from time to time the exercise of any power of (sic.) powers reserved or conferred on you by the said Loan Agreement or any instrument or instruments that may hereafter be executed by the Borrower/s in your favour and to exercise the same at any time and in any manner and either to enforce or forbear to enforce payment of principal or interest or other monies due to you by the Borrower/s or any of the remedies or securities available to you or to grant any indulgence or facility to the Borrower/s AND I SHALL not be released by any exercise by you of you (sic.) liberty with reference to the matters aforesaid or any of them or by reason of time being given to the Borrower/s or of any other forbearance, act or omission on your part or any other indulgence by you to the Borrower/s or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing me AND I hereby waive all suretyship an (sic.) other rights which I might otherwise be entitled to enforce or which but for this provision have the effect of releasing me.
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> (emphasis added)

10. In light of the expressed stipulations, in the guarantee, any reliance on Section 139 of the Contract Act is evidently futile and of no avail. In our view, therefore, the impugned judgment of the High Court is unsustainable and is fit to be set aside. We, accordingly, set aside the impugned judgment of the High Court and restore the order and decree passed by the trial court.

11. In the result the appeal is allowed but in the facts of the case, there will be no order as to costs.