

(1987) 10 BOM CK 0048

Bombay High Court

Case No: Appeal No. 274 of 1982 in Suit No. 1058 of 1975 and Appeal No. 458 of 1982 in Short Cause No. 1058 of 1975

Kanchanlal Chandulal Parikh and
Another

APPELLANT

Vs

Bank of India and Others

RESPONDENT

Date of Decision: Oct. 7, 1987

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80
- Contract Act, 1872 - Section 135
- Industries (Development and Regulation) Act, 1951 - Section 16A
- Sick Textile Undertakings (Nationalisation) Act, 1974 - Section 17, 18, 2, 2(1), 20
- Sick Textile Undertakings (Taking Over of Management) Act, 1972 - Section 5

Citation: AIR 1988 Bom 40 : (1988) MH LJ 184

Hon'ble Judges: Sugla, J; Bharucha, J

Bench: Division Bench

Advocate: J.I. Metha and Anand Desai, instructed by A.M.H. Shroff and Co, for the Appellant; A.N. Mody and D.D. Madon, Mulla and instructed by Mulla, C.J. Shah and S.M. Shah, for the Respondent

Final Decision: Dismissed

Judgement

Bharucha, J.

The appeal is directed against the judgment and order of Pendse J. decreeing the suit filed by the 1st respondent.

2. The facts that gave rise to file the suit, shortly stated, are these :

3. The Ahmedabad Jupiter Spinning, Weaving and Manufacturing Co. Ltd. (the 1st defendant) applied for a loan of Rs. 25,000,00/- to the Bank of India Ltd. in April 1968. An advance was made in this sum on 26th April 1968 in what was called

Account No. 1 repayable on demand with interest as stated. On the same day the following documents were executed. A demand promissory note was executed by the 1st defendant in favour of its directors - the 2nd, 3rd and 4th defendants in the sum of Rs. 25,000,00/- with interest as stated and the 2nd, 3rd and 4th defendants endorsed the promissory note in favour of the Bank of India Ltd. Letters of continuing security and of lien and set off were executed. The 2nd, 3rd and 4th defendants executed a deed of guarantee in favour of the said Bank. The 5th defendant, the State of Maharashtra, also executed a deed of guarantee in favour of the said Bank. The said Account No. 1 was operated upon from time to time.

4. In November 1968 the 1st defendant applied to the said Bank for another loan of Rs. 25,000,00/-. This advance was made in Account No. 2 on 21st November 1968 and it was repayable on demand with interest as stated. On the same date the 1st defendant executed a demand promissory note in the sum of Rs. 25,000,00/- with interest as stated in favour of the 2nd, 3rd and 4th defendants and the 2nd, 3rd and 4th defendants endorsed it in favour of the said Bank. Letters of continuing security and of lien and set off were executed. A deed of guarantee in respect of the said advance was executed by the 2nd, 3rd and 4th defendants in favour of the said Bank. In respect of this advance the 5th defendant executed a deed of guarantee in favour of the said Bank on 19th November 1968. The said Account No. 2 was operated from time to time,

5. On 9th July 1969 the undertaking of the said Bank and all its assets stood transferred to the plaintiffs by virtue of the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

6. On 2nd September 1969 and 2nd June 1970 the 5th defendant executed two deeds of guarantee guaranteeing repayment to the plaintiffs of the amounts due under the said Accounts Nos. 1 and 2.

7. On 16th July 1970 letters of acknowledgment in respect of both the said accounts were given by the 1st defendant and the 2nd, 3rd and 4th defendants confirmed that their guarantees were in full force and effect.

8. On 8th October 1971 the Central Government took over the management of the 1st defendant under other provisions of Section 16A of the Industries Development and Regulation Act, 1951, and appointed the National Textile Corporation as the Authorised Controller thereof.

9. On 6th February 1973 the plaintiffs called upon the Authorised Controller to repay the amounts due under the said Accounts Nos. 1 and 2. By two letters dated 22nd June 1973 the Authorised Controller acknowledged that the sums of Rs. 29,19,805.62 and Rs. 29,19,805.13 were due in the said Accounts Nos. 1 and 2 with interest as therein stated.

10. On 27 March 1974 the 5th defendant executed two deeds of guarantee in respect of the said Accounts Nos. 1 and 2.

11. On 21st December 1974 the Sick Textile Undertakings (Nationalisation) Act. 1974. came into force.

12. On 20th March 1975 and 25th/27th March 1975 respectively the plaintiffs advocates called upon the 1st defendant and the 2nd, 3rd and 4th defendants and the 5th defendant to pay the amounts due in respect of the said Accounts Nos. 1 and 2. Further correspondence ensued. On 22nd July 1975 a notice u/s 80 of the CPC was given and on 26th September 1975 the suit was filed to recover the amounts due under the said Accounts Nos. 1 and 2.

13. Pending the disposal of the suit, the 2nd defendant died. His heirs were brought on record.

14. On 2nd December 1981 the suit was decreed. The learned Judge rejected the submission made on behalf of the defendant that the suit was barred by limitation and that it was not maintainable. He held that there was no novation which absolved the 2nd, 3rd and 4th defendants of their liability under the deeds of guarantee.

15. The first of the two appeals before us (Appeal No. 274/82) is filed by the 3rd and 4th defendants. The second (Appeal No. 458/82) is filed by the 5th defendant.

16. Mr. Mehta, learned counsel for the appellants in the first appeal, submitted that the suit was barred by the law of limitation. He drew our attention to the fact that the learned single Judge had held the guarantees to be continuing guarantees. In his submission, these guarantees covered subsequent advances but were valid only for 3 years from the date of each advance.

17. Under the guarantees "the undersigned jointly and severally hereby guarantee that due payment two days after demand in writing, of all advances, liability....." would be made. The period of limitation would, therefore, start running only upon a demand being made. The suit is filed within 3 years of the demand being made and is, therefore, in time.

18. Mr. Mehta next submitted that there was an implicit novation of the contract whereby the plaintiffs had looked only to the 5th defendant for repayment of the advances made. He drew attention to the fact that fresh guarantees had not been required from the 3rd and 4th defendants but they had been required from the 5th defendant.

19. We see no novation, expressed or implied. The liability of the 3rd and 4th defendants under the guarantees executed by them remained and was not in any way affected by the renewals of the guarantees taken from the 5th defendant.

20. This brings us to the substantial point in the appeals. The submission of the appellants is that the liability of the principal debtor, the 1st defendant, stood discharged on nationalisation. Therefore, the liability of the guarantors stood discharged.

21. For the purposes of examining the submission it is necessary to refer to the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974 (now called "the Nationalisation Act".)

22. Section 2 of the Nationalisation Act is the definition section. Clause (d) of subsection (1) thereof defines "Custodian" to mean a Custodian appointed u/s 5 of the Sick Textile Undertakings (Taking Over of Management) Act. 1972. Clause (h) defines "Owner" when used in relation to a sick textile undertaking to mean any person or firm who or which is, immediately before the appointed day (which is 1st April 1974) the proprietor or lessee or occupier of the sick textile undertaking or any part thereof.

23. By reason of Section 3 of the Nationalisation Act, on the appointed day every sick textile undertaking and the right, title and interest of the owner in relation thereto stood transferred to and vested absolutely in the Central Government. Upon such vesting, every sick textile undertaking stood transferred to and vested in the National Textile Corporation. u/s 4 a sick textile undertaking is "deemed to include all assets, rights, leaseholds,.....and all property, movable and immovable, including lands, buildings.....cash balances, cash on hand, reserve funds, investments and book debts.....".

24. Section 5 reads thus :

"(1) Every liability, other than the liability specified in sub-section (2), of the owner of a sick textile undertaking, in respect of any period prior to the appointed day, shall be the liability of such owner and shall be enforceable against him and not against the Central Government or the National Textile Corporation.

(2) Any liability arising in respect of.-

(a) loans advanced by the Central Government or a State Government, or both to a sick textile undertaking (together with interest due thereon) after the management of such undertaking had been taken over by the Central Government.

(b) amounts advanced to a sick textile undertaking (after the management of such undertaking had been taken over by the Central Government), by the National Textile Corporation or by a State Textile Corporation or by both, together with interest due thereon.

(c) wages, salaries and other dues of employees of the sick textile undertaking, in respect of any period after the management of such undertaking had been taken over by the Central Government, shall, on and from the appointed day, of the

liability of the Central Government and shall be discharged, for and on behalf of that Government by the National Textile Corporation as and when repayment of such loans or amounts becomes due or as and when such wages, salaries or other dues become due and payable.

(3) For the removal of doubts, it is hereby declared that.-

(a) save as otherwise expressly provided in this section or in any other section of this Act, no liability, other than the liability specified in sub-section (2), in relation to a sick textile undertaking in respect of any period prior to the appointed day, shall be enforceable against the Central Government or the National Textile Corporation;

(b) no award, decree or order of any Court, tribunal or other authority in relation to any sick textile undertaking passed after the appointed day in respect of any matter, claim or dispute, in relation to any matter not referred to in sub-section (2), which arose before that day, shall be enforceable against the Central Government or the National Textile Corporation;

(c) no liability of any sick textile undertaking or any owner thereof for the contravention, before the appointed day, of any provision of law for the time being in force, shall be enforceable against the Central Government or the National Textile Corporation.

Explanation : - In this section "State Textile Corporation" means a Corporation, formed and registered under the Companies Act, 1956, in a State, which is in charge of the management of a sick textile undertaking either as a person authorised under the Industries (Development and Regulation) Act 1951, or as the Custodian under the Sick Textile Undertakings (Taking Over of Management) Act, 1972 and includes the West Bengal State Textile Corporation Limited which has advanced amounts to sick textile undertakings in the State."

25. Under the provisions of Section 8 the owner of every sick textile undertaking is required to be given by the Central Government an amount equal to the amount specified in the corresponding entry in the 1st Schedule, Payment of a further amount u/s 9 is contemplated, in consideration of the retrospective operation of the provisions of Sections 3, 4 and 5, and the payment of interest thereon is provided for. "The appointment of Commissioners of Payments is made u/s 17". The amount to be paid to the owner is, by reason of Section 18, to be paid by the Central Government to the Commissioner for Payment to the owner.

26. Section 20 deals with claims to be made to the Commissioner, and its principal clause reads thus :

"Every person having a claim against the owner of a sick textile undertaking shall prefer such claim before the Commissioner within thirty days from the specified date."

27. Section 21 deals with priority of claims and needs reproduction :

"The claims arising out of the matters specified in the Second Schedule shall have priorities in accordance with the following principles namely :-

(a) Category I will have precedence over all other categories and Category II will have precedence over Category III and so on;

(b) the claims specified in each of the categories except Category IV shall rank equally and be paid in full, but if the amount is insufficient to meet such claims in full, they shall abate in equal proportions and be paid accordingly;

(c) the liabilities specified in category IV shall be discharged, subject to the priorities specified in this section, in accordance with the terms of the secured loans and the priority inter se of such loans, and

(d) the question of payment of a liability with regard to a matter specified in a lower category shall arise only if a surplus is left after meeting all the liabilities specified in the immediately Higher category."

28. Sections 22 and 23 deal with the examination of claims and the admission or rejection of claims. Section 24 provides that after the admission of a claim the amount due in respect thereof shall be credited by the Commissioner to the relevant fund to be paid to the person to whom the amount is due and "on such credit or payment the liability of the owner in respect of such claim shall stand discharged."

29. The Commissioner is authorised by Section 25 to disburse the balance, after meeting the liabilities specified in the Second Schedule, to the owner of the sick textile undertaking.

30. Section 27 reads thus :

"(1) Where any liability of the owner of a sick textile undertaking arising out of any item specified in Category I of the Second Schedule is not discharged fully by the Commissioner out of the amount paid to him under this Act, the Commissioner shall intimate in writing to the Central Government the extent of the liability which remains undischarged, and that liability shall be assumed by the Central Government.

(2) The Central Government may, by order, direct the National Textile Corporation to take over any liability assumed by that Government under sub-section (1) and on receipt of such direction, it shall be the duty of the National Textile Corporation to discharge such liability."

31. Section 5 of the Nationalisation Act is specific. It provides that every liability (other than the liability specified in sub-section (2) thereof, with which we are not concerned) in respect of any period prior to the appointed day shall be the liability of

the owner and shall be enforceable against him. The Nationalisation Act does not, therefore, absolve the owner of any liability.

32. The appellants' submission is that, in any event, such liability is limited to the amount payable to the owner u/s 8 and enforceable only under the provisions of Sections 20 to 24. Reliance is placed upon the obligation seemingly cast by Section 20 upon every person having a claim against the owner to prefer it before the Commissioner. Emphasis is laid upon clause (b) of Section 21 which says that the claims specified in each of the categories in the Second Schedule, except Category IV, shall be paid in full, but, if the amount is insufficient to meet the claims in full, they shall "abate in equal proportions and be paid accordingly." Because the word "abate" is used it is suggested that if there is not enough money available to meet the claim, the claim ceases to exist. Stress is laid on the liability of the owner standing discharged upon payment of a claim by reason of the provisions of Section 24. Stress is also laid on the provisions of Section 27 whereby the liability of the owner arising out of any item specified in Category I of the Second Schedule which is not discharged fully by the Commissioner out of the amount paid to him is assumed by the Central Government. It is submitted that if the liability of the owner was not effaced by the provisions of the Act. there was no reason for the Central Government to take over this liability.

33. The Shorter Oxford English Dictionary defines "abate" to mean *inter alia*, "to curtail" and "to bring down in size, amount, value." So read, clause (b) Section 21 only means that if the amount is insufficient to meet the claims in full, the claims shall stand reduced in the same proportion and shall be so paid. The word "abate" is not used to indicate that claims, to the extent that they remained unpaid, stand discharged.

34. Section 24 confers a discharge upon the owner only to the extent that his liability is reduced by the payment on a claim. To the extent that the claim is not honoured by the Commissioner the owner's liability is not discharged.

35. In regard to Section 27, it must be noted that the liability that is assumed by the Central Government is only such liability as arises out of any item specified in Category I of the Second Schedule and has, not been fully discharged by the Commissioner. The Second Schedule sets out the "order of priorities for the discharge of liabilities in respect of a sick textile undertaking." Part A thereof is comprised of Category 1 and the Category II and refers to the "post-take-over management period." Part. B. which is comprised of Categories III to VI, relates to the "pre-take-over management period." Category lists loans from banks, institutions and others and credited availed of for the purposes of trade or manufacturing operations. The liability that is assumed by the Central Government, therefore, relates only to such loans and credits taken when the management of the undertaking was in the hands of the Custodian under the Sick Textile Undertaking (Taking Over of Management) Act, 1972.

36. The Nationalisation Act, read overall, does not, therefore, limit the liability of the owner to the amount of compensation under the Nationalisation Act. In providing a machinery for the adjudication of claims against an owner, the Nationalisation Act only protects the interests of creditors of the owner to the extent of the amount payable to the owner under it.

37. We are, accordingly, unable to accept the submission made on behalf of the appellants that, by reason of the Nationalisation Act, the liability of the owner stands discharged or curtailed that, consequently, the liability of the guarantors stands discharged.

38. We are supported in the view that we take by two High Courts which have considered the same or analogous provisions. In [Bihar State Electricity Board and Another Vs. Gaya Cotton and Jute Mills Ltd.](#) , the contention that no decree could be passed in view of the provisions of the Nationalisation Act was considered and it was held that the Nationalisation Act did not deal with a claim based on a personal liability which could be enforced by a suit. A single Judge of the Calcutta High Court in [The Indian Cable Co. Ltd. Vs. Lodna Colliery Co. \(1920\) Ltd.](#) , held that the analogous provisions of the Coal Mines (Nationalisation) Act, 1973 neither directly nor by implication took away the jurisdiction of the civil courts to entertain suits against the ex-owners of collieries nationalised thereby, particularly in respect of claims arising before the appointed day. The statute only laid down a procedure for having certain claims admitted and adjudicated upon by the Commissioner at the instance of creditors, to be realised out of compensation monies payable to such owners.

39. In the view that we take, it is not necessary to consider the alternative submission made by Mr. Mody, learned counsel for the respondents, we may only indicate the submission and the judgment of the Supreme Court upon which it is based. The submission is that even assuming that, by reason of the Nationalisation Act; the liability of the principal debtor stood discharged, the guarantors are not discharged. The submission is based on the judgment in [Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another](#) . The Supreme Court held that the liquidation of the company, the principal debtor, did not have any effect on the liability of the surety. A discharge which a principal debtor secured by operation of law did not absolve the surety of his liability.

40. In the result, the judgment and order of the learned single Judge must be upheld.

41. The appeals are dismissed with costs.

42. Mr. Mody states that credit shall be given to all the defendants in respect of the amount, if any, received by the plaintiff from the Commissioner under the Nationalisation Act.