Before M.M. Kumar & Ajay Kumar Mittal, JJ

SURESH CHAND JAIN AND OTHERS,—*Petitioners*

versus

HARYANA FINANCIAL CORPORATION AND OTHERS,—*Respondents*

C.W.P. No. 9610 of 2007

27th November, 2007

Constitution of India, 1950—Art.226—Indian Contract Act, 1872—S.62—Petitioners stood guarantors against loan disbursed by HFC—HFC accepting request of borrower for re-scheduling entire outstanding amount and extending period for 2 years—Default in repayment of loan amount—HFC selling the Unit and also selling additional securities—Notice to guarantors requiring to pay outstanding amount—Challenge thereto—Whether on re-scheduling of outstanding amount and thereby granting extension of 2 years to borrower would discharge from liability of guarantors—Held, no-Provisions of loan agreement provide that guarantee was to be continuing one and it was to remain in full force and effect till time borrower repaid in full loan together with interest and other charges-Rescheduling of loan and extending period for its repayment for benefit of surety and not to their disadvantage—It cannot constitute basis to conclude that there is novation of contract of such a nature as to discharge guarantors—Petition dismissed.

Held, that a perusal of the provisions of Clause 5 of the loan agreement makes it evident that the guarantee furnished by the petitioners was to be continuing one and it was to remain in full force and effect till the time the borrower has repaid in full the said loan together with interest, commitment charge, liquidated damages, costs, charges and all other moneys that may become due under the agreement. The provisions made in clause 18 are also in the same terms. Therefore, it cannot be concluded that merely on rescheduling of the outstanding amount and thereby granting extension of period of two years, the petitioners would stand discharge because they themselves have agreed to continue to be guarantors till the repayment of

loan. Even otherwise, if the alterations in the instrument of guarantee are to the benefit of the guarantor then it would not result into discharge. Rescheduling of loan and extending the period for its repayment had resulted to the benefit of the surety and not to their disadvantage. Therefore, it cannot constitute the basis to conclude that there is novation of contract of such a nature as to discharge the petitioners, who are guarantors.

(Para 7)

R.P. Kansal, Advocate, *for the petitioners.*

Kamal Sehgal, Advocate, *for respondent Nos. 1 and 2.*

Ms. Ritu Bahri, DAG, Haryana, *for respondent Nos. 3 and 4.*

JUDGMENT

M.M. KUMAR, J.

(1) This petition filed under Article 226 of the Constitution prays for quashing summons dated 24th May, 2007, issued by respondent No. 3 (P-4 & P-5) and for issuance of directions to the respondents not to recover an amount of Rs. 2,77,85,429 or any other amount from the petitioners, who are guarantors of the loan obtained by M/s Kurukshetra Paper Mills Pvt. Limited.

(2) Brief facts of the case are that M/s Kurukshetra Paper Mills Pvt. Limited, Kurukshetra (for brevity, 'the borrower'), obtained a term loan of Rs. 120 lacs from the Haryana Financial Corporation-respondent No. 1,—*vide* loan agreement dated 7th August, 1997 and the petitioners stood as gurantors against that loan.The loan was to be repaid in 27 quarterly instalments along with interest @ 19% per annum. The 27th instalment was to be paid by 1st August, 2005. It was also stipulated that if the last instalment was paid on 6th August, 2005, no penal interest was to be added. In July, 1999, the unit of the borrower started production. On 4th October, 2001, respondent No. 2 accepted the request of the borrower for re-scheduling the entire outstanding amount as well as extension for 2 years till 6th August, 2007, subject to the conditions that the borrower was to pay Rs. 1,00,000 as down payment (which were received on 28th September, 2001), Rs. 3,00,000 in October, 2001, Rs. 2,80,000 each per

month from November, 2001 to March, 2001. It was further manifested that after extending the period of 2 years, balance outstanding amount including accured interest was to be paid in 22 equal quarterly instalments of Rs. 12.32 lacs starting from April, 2002 till 6th August, 2007. Balance, if any, was to be paid within currency of loan. It was specifically mentioned in the letter dated 4th October, 2001 that even a single default was to attract legal action including taking over possession of the unit and the Corporation was to charge higher rate of interest on the amount rescheduled (P-2). It is alleged that the petitioners were not called upon to give their consent regarding variations in the terms of original loan agreement. On 11th January, 2002, respondent No. 2 further accepted the request of the borrower and corrency period of loan amount was further extended up to 6th August, 2008 (P-3).

(3) It is claimed that respondent No. 1 Corporation forced the borrower to pay an amount of Rs. 9,62,856 in December, 1998 before start of production and from 4th August, 1998 to 27th December, 2001, an amount of Rs. 44,82,656 was paid by it. On 19th February, 2002, possession of the unit was taken over by the respondent Corporation and on 24th February, 2003, entire property including plant, machinery and additional machinery of the unit of M/s Kurukshetra Paper Mills Pvt. Limited was sold for an amount of Rs. 47,50,000 in favour of one Shri Sanjay Singla. The respondent Corporation further sold other collateral securities and properties of the guarantors valuing Rs. 98,85,000. In this manner, Rs. 1,43,67,656 are stated to have been recovered by the respondent Corporation. It has still further been claimed that on 16th July, 2004, two plots measuring 2178 Sq. ft. with residential constructed building, situated in Ward No. 6, Pehowa, being House No. 542, belonging to the petitioner No. 3 had been sold for an amount of Rs. 13,00,000. Now, summons dated 24th May, 2007 (P-4 and P-5) have been issued by the Tehsildar, Thanesar (respondent No. 3) requiring the petitioners to pay an amount of Rs. 2,77,85,429 being outstanding amount towards the respondent Corporation.

(4) In the written statement filed on behalf of the respondent Corporation, the stand taken is that the petitioners have executed a Bond of Gurantee, dated 7th August, 1997, owing their liability for repayment

of loan jointly and severally, unconditionally to the respondent Corporation. It has been pointed out that the petitioners have submitted absolutely an irrevocable guarantee agreeing that the Corporation shall have sole discretion to make disbursement or to make interim disbursement on such conditions as the Corporation may decide. They have also agreed that without any concurrence from the guarantors, the borrower and the Corporation were at liberty to vary, alter or modify the terms and conditions of the agreement and the security created. The respondent Corporation has also been authorised to defer, postpone or revise the repayment of the loan or payment of interest and other money payable by the borrower to it. The petitioners have also agreed that the liability under guarantee was in no manner affected by any variations, alterations, modifications, waiver dispensation with or release of security and no further consent from the guarantor would be required for giving effect to such variation, alteration or modification etc. In this regard reference has been made to Clause 5 and 18 of the Boad of Guarantee (R-2). The respondent Corporation also asserted that the borrower has only deposited a sum of Rs. 37,43,268 from 4th August, 1998 to 27th December, 2001 and not Rs. 44,82,656 as claimed by the petitioners. It has further been denied that it has ever claimed a sum of Rs. 9,62,656, rather a demand notice dated 21st October, 1998 was issued for a sum of Rs. 4,85,716, which fell due on 1st November, 1998. The action of the respondent Corporation in taking over possession of the unit and selling the same for a sum of Rs. 47.50 lacs as also selling of additional securities for Rs. 98,85,000 has been justified, inasmuch as, even after reschedulement the borrower has defaulted in repayment of the loan amount. It has been asserted that the amount received against sale of unit and mortgaged properties etc. has been adjusted against interest and misc. expenses and the principal remained same with further interest, which has resulted accumulation of a sum of Rs. 2,77,85,429. Accordingly, the respondent Corporation has issued recovery certificates to the District Collector, Kurukshetra, Yamunanagar and Fatehabad, after issuing determination notice, dated 14th November, 2006.

(5) Having heard learned counsel for the parties at a considerable length we find that this petition lacks merit and is, thus, liable to be dismissed. The concept of novation of contract is envisaged by Section 62 of the Indian

Contract Act, 1872 (for brevity, 'the Act'). Section 62 of the Act reads as under :

> "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."

(6) It is well known that novation is of two kinds (a) novation involving change of parties; and (b) involving substitution of a new contract in place of the old one. The present case at best may fall in the second type of novation. However, the question is whether the petitioners, who are guarantors, would stand discharge in the facts and circumstances of this case. In that regard it would be necessary to make a reference to clause 5 and 18 of the loan agreement duly signed by the petitioners and the same read as under :—

> "5. The Guarantors hereby agree that, without the concurrence of the Guarantors the borrower and HFC shall be at liberty to vary, alter or modify the terms and conditions of the said Agreement and of the security created and the security documents executed by the borrower in favour of HFC and in particular to defer, postpone or revise the repayment of the said Loan and/or the payment of interest and other monies payable by the borrower to HFC on such terms and conditions as may be considered necessary by HFC including any increase in the rate of interest. HFC shall be at liberty to absolutely dispense with or release all or any of the security/securities furnished or required to be furnished by the borrower to HFC to secure the said loan. The guarantors agree that the liability under this guarantee shall in no manner be affected by any such variations, alteration modifications, waiver dispensation with or release of security, and that no further consent of the Guarantors is required for giving affect to any such variation, alteration, modification, waiver dispensation with, or release or security."
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"18. This Guarantee shall be continuing one and shall remain in full force and effect till such time the Borrower repays in full the said Loan together with interest, commitment charge, liquidated damages, costs, charges, and all other moneys that may from time to time become due and payable and remain upaid to HFC under the said Agreement."

(7) A perusal of the aforementioned provisions makes it evident that the guarantee furnished by the petitioners was to be continuing one and it was to remain in full force and effect till the time the borrower has repaid in full the said loan together with interest, commitment charge, liquidated damages, costs, charges and all other moneys that may become due under the agreement. The provisions made in clause 18 are also in the same terms. Therefore, it cannot be concluded that merely on re-scheduling of the outstanding amount and thereby granting extension of period of two years, the petitioners would stand discharge because they themselves have agreed to continue to be guarantors till the repayment of loan. Even otherwise, if the alterations in the instrument of guarantee are to the benefit of the guarantor then it would not result into discharge. In the case of **M.S. Anirudhan** *versus* **Thomco's Bank (1),** it was held by Hon'ble the Supreme Court unsubstantial alterations in an instrument, which are to the benefit of the surety do not discharge the surety from the liability. The surety may be discharged if the alteration made is to his disadvantage or its unsubstantial character is not self evident. In the present case, rescheduling of loan and extending the period for its repayment had resulted to the benefit of the surety and not to their disadvantage. Therefore, it cannot constitute the basis to conclude that there is novation of contract of such a nature as to discharge the petitioners, who are guarantors. The principles laid down in M.S. Anirudhan's case *(supra)* have been further approved by Hon'ble the Supreme Court in the case of **Ram Khilona** *versus* **Sardar(2).**

(8) In view of the above, there is no room to accept the argument raised on behalf of the petitioners concerning novation and consequently the petitioners could not be deemed to be discharged. No other argument has been raised. Accordingly, the writ petition is wholly without merit and the same is dismissed.

R.N.R.

(1) AIR 1963 S.C. 746
(2) (2002)6 S.C.C. 375