Srinivas Gupta vs Hindustan Commercial Bank Ltd. on 3 October, 1966

Equivalent citations: [1967]37COMPCAS434(SC), AIRONLINE 1966 SC 7

Bench: K.N. Wanchoo, J.M. Shelat, G.K. Mitter

JUDGMENT

Wanchoo, J.

1. This is an appeal by special leave against the judgment and decree of the Allahabad High Court, and arises in the following circumstances. The respondent is the Hindustan Commercial Bank Limited (hereinafter referred to as " the bank ") with its head office at Kanpur. It opened a branch in Jhansi in the year 1944. The appellant was appointed treasurer under an agreement dated October 30, 1944, and had deposited a security of Rs. 10,000 in that behalf. Clause 13 of the agreement was that the treasurer would be incharge of and look after all commodities and goods that might be accepted by the bank as securities for advances and he would also be liable to see that the goods and articles given to the bank as security were not only genuine but of the same kind and quality which they were said to be when the advance was made. It was also provided that if the bank was put to any loss in this matter, the treasurer would be held responsible and would make good the loss himself to the bank. Further, in order that the treasurer might be able to discharge the responsibility thus placed on him, the godown-keepers and assistant godown-keepers were to be employed by the treasurer to look after the goods given in security to the bank subject to the final sanction of the bank. Clause 24 of the agreement, inter alia, provided that the amount of Rs. 10,000 would be deposited as security for the due performance by the treasurer of his obligations under the agreement and for the discharge of all the liabilities which he might incur to the bank, either under or by virtue of the agreement or by reason of the non-performance on his part of any of his obligations thereunder. Finally, Clause 26, inter alia, provided that the security deposited would be under the absolute control and dominion of the bank and would at all times be available for appropriation by the bank towards reimbursing or making good any loss, damage, costs, charges or expenses to which the bank was entitled under any of the provisions of the agreement, and, subject to any such claim by the bank, the money would be returned six months after termination of his services.

2. The facts which have led to the present dispute may now be briefly stated. Messrs. Tailong Brothers had a cash credit account with the bank. They obtained advances off and on against the security of 1,164 tins of ghee and linseed, and the total amount thus advanced was somewhere about Rs. 80,000. The appellant as the treasurer had to look after all commodities and goods accepted by the bank as security, and it was his responsibility to see that the goods given to the bank as security were of the same kind and quality which they were said to be at the time of the advance. The

appellant appears to have certified the security given by Messrs. Tailong Brothers as sufficient. In March, 1947, while the checking of securities deposited with the bank was going on, it was discovered that ghee in some of the tins, given in security by Messrs. Tailong Brothers, was rotten and some of the tins only contained water. The bank held the appellant responsible for this state of affairs and in consequence the services of the appellant were dispensed with by the bank from June 30, 1947. It appears that before that the appellant had exerted himself to obtain for the bank two mortgages as security for the advance made to Messrs. Tailong Brothers, and this was done on April 1, 1947. It may be mentioned that Messrs. Tailong Brothers was a firm carried on by four brothers. One Vankat Rao Tailong was their father. On April 1, 1947 two mortgage deeds were executed, one by the father for Rs. 35,000 and the other by the four brothers for Rs. 28,497-13-8. It may be added that on that day Rs. 63,497-13-8 were due to the bank from the four brothers on the basis of the cash credit account. Further, the mortgage deed executed by the four brothers provided that the joint and several personal liability of the four brothers for the sum of Rs. 35,000 for which their father had executed the mortgage deed was in no way limited or extinguished or otherwise affected by the bank accepting the mortgage of Rs. 35,000 from the father, but would remain intact till the entire debit balance in the account, i.e., Rs. 63,497-13-8, was fully paid up. It may also be added that in the mortgage by the brothers it was provided that four months' time had been given to them to pay up the dues of the bank in full.

3. To resume the narrative, the bank terminated the services of the appellant from June 30, 1947, after giving necessary notice provided under the agreement. The bank, however, did not return the security money after the expiry of six months from June 30, 1947, as provided in the agreement. Thereupon the appellant served a notice on the bank for the return of the security money, and the bank's contention in reply was that the money could not be returned as long as the account of Messrs. Tailong Brothers had not been adjusted, as the appellant was responsible for the loss that might accrue to the bank on that account in terms of Clause 13 of the agreement. The appellant, therefore, filed the suit out of which the present appeal has arisen in July, 1950. His case was that as he had arranged the two mortgages in favour of the bank on April 1, 1947, from the four brothers who formed the firm of Messrs. Tailong Brothers and from their father, his responsibility, if any, under the terms of the agreement had come to an end. Therefore, he sued for the return of the security money along with interest. The bank resisted the suit and its case was that the responsibility of the appellant did not come to an end merely with the execution of the two mortgage-deeds and that he was responsible so long as the entire money due to the bank had not been fully recovered from Messrs. Tailong Brothers, and the mere execution of the mortgage deeds did not absolve the appellant of his responsibility under Clause 13 of the agreement.

4. The main question for decision, therefore, was whether the execution of the two mortgage deeds had absolved the appellant of his responsibility under Clause 13 of the agreement. The trial court held that the security held by the bank in the shape of the two mortgages was more than ample and therefore the responsibility of the appellant had come to an end and the bank was bound to return the security under Clause 26 of the agreement. The suit for the return of security money was, therefore, decreed.

5. The bank then went in appeal to the High Court. The High Court allowed the appeal and held that Clause 13 of the agreement was a contract of indemnity and mere execution of the two mortgages would not absolve the appellant of the responsibility that lay on him under Clause 13. It further Held that the question whether any loss had arisen to the bank could only be determined after the bank had actually been able to recover the money from Messrs. Tailong Brothers. Finally, it held that the security money was refundable when there was no claim of the bank under the terms of the agreement, but there being such a claim the security money could not be ordered to be returned to the appellant. On this view the suit of the appellant was dismissed. The appellant then obtained special leave from this court ; and that is how the matter has come before us.

6. We are of opinion that there is no force in this appeal. Clause 13 of the agreement is clearly a contract of indemnity by which the bank is indemnified in connection with certain matters mentioned therein. It has not been and cannot be disputed that when it was found that the tins of ghee contained rotten ghee or water, the appellant became liable under the contract of indemnity contained in Clause 13 of the agreement. Under that clause it was his duty ,to see that goods pledged to the bank as security were not only genuine but of the same kind and quality which they were said to be when advance was made. Clearly the advance was made by the bank on the assurance of the appellant that the tins of ghee given as security were genuine and of standard quality. When however they were found later on to be full of either rotten ghee or water, the appellant became liable under Clause 13 for the loss caused to the bank by the security being found to be not of the kind and quality which it was stated to be.

7. The only question then is whether the liability of the appellant which arose under Clause 13 on the discovery that the tins contained either rotten stuff or water can be said to have been discharged by the execution of two mortgage deeds on April 1, 1947, which the appellant arranged. We agree with the High Court that that is not so. It is true that the original security consisting of tins of ghee having been found to be non-existent, the appellant did arrange for execution of two mortgage deeds to secure the bank. But that fact alone is not in our opinion enough to absolve the appellant of the liability which lay on him under Clause 13 of the agreement. The liability under the contract of indemnity contained in that clause was to make good the loss to be caused to the bank in circumstances like the present to which Clause 13 is applicable. The mere fact that two mortgage deeds were executed for the entire amount due on April 1, 1947, does not in our opinion amount to payment of money due to the bank. All that the transaction amounted to was that, in place of the tins of ghee, the two mortgages were given as security ; but the liability under Clause 13 having accrued because the tins of ghee were found to be not of the kind and quality which they were stated to be, the execution of mortgage deeds by itself cannot be said to have made up the loss to the bank. The responsibility of the appellant under Clause 13 was to make good the loss to the bank, and mere execution of the mortgage deeds does not make good the loss which can only be made good after the money secured by the mortgages has been realised. The view taken by the High Court that the security money was refundable only when there was no claim of the bank for any loss under the terms of the agreement and that there being such a claim in the present case, the security money could not be ordered to be refunded till the entire sum due was actually realised is therefore correct. The mere execution of two mortgage deeds as security does not amount to realisation of the sum due and would not show that there was no loss to the bank on account of the fact that the security of tins

of ghee was not of the kind and quality which it was stated to be.

8. It has, however, been urged on behalf of the appellant that, since the judgment of the High Court, certain circumstances have intervened which show that the liability of the appellant has come to an end. It appears that two suits were filed by the bank on the basis of the two mortgages, one against the four brothers, and the other against the father. The suit against the four brothers was decreed but the suit against the father was dismissed. The appeal by the bank against the dismissal of the suit against the father was also dismissed by the High Court and thereafter a petition for leave to appeal to this court was filed in the High Court. As to the decree against the four brothers it was put in execution and a compromise was arrived at in 1961 by which Rs. 20,100 were paid to the bank while the remaining amount due was to be paid in certain instalments. The terms of that compromise relating to instalments, however, were not carried out by the four brothers and in consequence the bank had to file another execution application. Finally, compromise was arrived at in August, 1966, in the second execution application and a sum of Rs. 24,000 was paid to the bank and this amount together with Rs. 20,100 was taken in full satisfaction of the decree against the four brothers. It was also agreed that the bank would not prosecute the application' for leave to appeal against the father, and the father would not execute his decree for costs.

9. It is urged that in view of this compromise the entire liability of Messrs. Tailong Brothers is wiped off and in consequence the appellant is now entitled to refund. We are of opinion that this is not the correct interpretation of the compromise arrived at in August, 1966. It is true that by this compromise the decree against the four brothers on the mortgage for Rs. 28,497-13-8 has been satisfied. It is also true that by this compromise the bank which had already lost in two courts against the father had agreed not to proceed against the father on the basis of the other mortgage for Rs. 35,000 executed by the father. But that only means that the father's liability under the mortgage no longer exists. We have already referred to the clause in the mortgage deed executed by the brothers which shows that their joint and several personal liability was not to be affected by the execution of the mortgage-deed by the father. Therefore, it cannot be said that the bank by agreeing not to proceed against the father on the basis of the mortgage deed executed by him had agreed to absolve the brothers also from their personal liability for the sum of Rs. 35,000. It follows therefore that the liability of Tailong Brothers for the sum of Rs. 35,000 which had been secured by the second mortgage still remains. As such the appellant is liable under the contract of indemnity contained in Clause 13 to make good the loss yet in spite of the compromise in the second execution application. Learned counsel for the appellant has referred in this connection to a number of cases relating to contracts of guarantee. We think it unnecessary to refer to them because a contract of indemnity is very different from a contract of guarantee. Reference is also made to Section 126 to Section 147 in Chapter VIII of the Indian Contract Act, No. 9 of 1872. We do not think it necessary to refer to these sections because they refer to contracts of guarantee and not to contracts of indemnity, which Clause 13 is. There is a clear distinction between a contract of indemnity on the one hand and a contract of guarantee or suretyship on the other. The present is clearly a case of a contract of indemnity and Clause 13 of the agreement being applicable, the appellant is under the contract of indemnity bound to indemnify the bank for the loss caused to it. Further it is clear in this case that, even after the compromise, the bank has not yet recovered Rs. 63,497-13-8, and, in that sense there has been loss to the bank and so Clause 13 applies and therefore, by virtue of Clause 26 the appellant

is not entitled yet to refund of the security money.

10. The appeal, therefore, fails and is hereby dismissed with costs.