

(1999) 11 KAR CK 0044
In the Karnataka High Court
Case No : C.R.P. No. 1972 of 1996

B. Yuvaraj Shetty

APPELLANT

Vs

Maharashtra Apex Corporation Limited and Others

RESPONDENT

Date of Decision : 29-11-1999

Acts Referred:

Contract Act, 1872 — Section 128, 135, 140, 141

Citation : (2002) 112 CompCas 338 : (2000) ILR (Kar) 3394 : (2000) 2 KCCR 862

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : G. Balakrishna Shastry, for the Appellant; P. Ganapatha Bhat and Ganesh Bhat Y.H., for the Respondent

Final Decision : Dismissed

Judgement

T.N. Vallinayagam, J.—The second judgment-debtor in Execution Case No. 24 of 1994, on the file of the Civil Judge, at Puttur has preferred the above civil revision petition challenging the correctness or otherwise overruling his objections regarding the execution as against him.

2. It is contended that the petitioner herein is only the surety and when the execution was not pressed against the principal debtor, the surety alone cannot be proceeded against. The view of the court below that the decree-holder is entitled to proceed against any of the judgment-debtors is not correct and the dictum of this court in Maharashtra Apex Corporation Ltd. Vs. Poovappa Salian and Another, , has not been followed.

3. Heard the respective counsel.

4. In this case, the facts are not in dispute. The reliance was placed upon the dictum of this court in Maharashtra Apex Corporation Ltd. Vs. Poovappa Salian and Another, , to the following effect:

"Sections 135, 140 and 141 of the Contract Act make it clear that the right of the surety continues even if the decree is passed and the relationship between him and the principal-debtor continues as a principal-debtor and surety ... Even if the decree is passed, it may be that after the decree is passed, the principal borrower as well as the surety are jointly and severally liable to pay the decree debt. The decree-holder may proceed against the surety as the liability is made joint and several by the decree itself. That does not mean that the relationship between the principal-debtor and the surety has ceased after the decree is passed.

(ii) u/s 135, even if the creditor gives some time to the principal judgment-debtor without the assent of the surety, the surety stands discharged ... The granting of instalments by the decree-holder to the principal-debtor amounts to the giving of time to the principal-debtor. Therefore, in view of the clear principle laid down by Section 135, the liability of the surety stood discharged."

5. The dictum of S.V. Apparao v. Vijaya Bank was relied upon to the following effect (headnote of Kar LJ) :

"The decree is executable primarily against the judgment-debtor and, by its very implication, the term surety presupposes the fact that his liability though co extenso would commence only at the point of time when the bank's recovery becomes impossible vis-a-vis the principal-debtor. Unlike in partnership cases, that the liability is not joint and several but that the liability arises virtually consecutively or in other words that a surety would become liable only when it is demonstrated that the amount is irrecoverable from the judgment-debtor. There may be situations to justify the bypassing of the principal-debtor such as if his whereabouts are unknown or if the record indicates that he is insolvent or in such a condition that nothing would be recoverable from him. There must however be some material placed before the court to justify the action directed against the surety in the first instance. The precaution that the executing court must take is to first ensure that reasonable efforts for execution have been made as against the principal debtor. It is always a rule of caution that an executing court must observe to ensure that even in executing a decree, that the right parties are proceeded against in the right order.... In the present case, the application for execution did not make out any special ground for purposes of bypassing judgment-debtor No. 1 and to this extent, therefore, the action taken straightaway against judgment-debtor No. 2 will have to be interfered with. If the surety No. 2 is in position to satisfy the court that there is sufficient ground to execute the decree against judgment-debtor No. 1, efforts along those lines shall first be taken."

6. But these two decisions are contrary to the dictum laid down by the Supreme Court in State Bank of India Vs. Messrs. Indexport Registered and others, . In that case, the dictum of Union Bank of India Vs. Manku Narayana, , which is to the following effect was considered (page 3 of 62 Comp Cas) :

"The decree in execution is a composite decree, personally against the defendants including the respondent and also against the mortgaged property. We do not pause to consider whether the two portions of the decree are severable or not. We are of the view that since a portion of the decreed amount is covered by the mortgage, the decree-holder bank has to proceed against the mortgaged property first and then proceed against the guarantor. Since the High Court was not told that such steps were taken, we do not think we will be justified in holding that the High Court was in error in making the direction which is under challenge before us."

"The liability of the surety is co-extensive with that of the principal-debtor, unless it is otherwise provided by the contract". "If on principle a guarantor could be sued without even suing the principal-debtor, there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. In such a case, when the said decree had become final all pleas as to the rights which the guarantor had had to be taken during the trial and not after the decree while execution is being levied."

7. And in State Bank of India Vs. Messrs. Indexport Registered and others, , it is held (page 9 of 75 Comp Cas) :

"The decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against judgment-debtor No. 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It appears the above-quoted observations in Union Bank of India v. Manku Narayana [1987] 62 Comp Cas 1 SC kar, are not based on any established principle of law and/or reasons, and in fact, are contrary to law. It, of course, depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. For a simple mortgage decree as prescribed in Form No. 5 of Appendix D of the CPC it could be so because the decree provides like that. It is only when the sum realised on sale of the mortgaged property is insufficient that the judgment-debtor can be proceeded against personally. But the observations of the court in Union Bank of India v. Manku Narayana [1987] 62 Comp Cas 1 kar; that even if the two portions of the decree are severable and merely because a portion of the decretal amount is covered by the mortgage decree, the decree-holder per force has to proceed against the mortgaged property first, are not based on any principle of law. With all due respect to the learned judges, in the light of the

observations made by us earlier, we are constrained to observe that Manku Narayana"s case [1987] 62 Comp Cas 1 kar was not correctly decided."

8. The contention now raised was that the decree-holder cannot proceed against any one of the judgment-debtors at his whims and fancy. Repelling" such contention, the Supreme Court laid down the above principles of law. The apex court also considered that the decree is against the guarantor as well as against the principal borrower. But applying the principles of Section 128 of the Indian Contract Act that the liability of the surety is a co-extensive with that of the principal-debtor unless it is otherwise provided by the contract.

9. In the light of the above dictum, the objections of the petitioner are not sustainable. Even in a mortgage decree, it is held that in State Bank of India Vs. Messrs. Indexport Registered and others, :

"If the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree."

10. Consequently, the view taken by the trial court is sustainable and there can be no fetter on the execution of the decree by the decree-holder against any one of the judgment-debtors in joint and several decree and putting up any fetter will be against all canons of law and principles of natural justice.

11. In this view, following the above Supreme Court dicta, this civil revision petition is dismissed with costs.