
(2009) 12 GAU CK 0019

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 7709 of 2005

Hoka Konyak

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 1, Order 12 Rule 2, Order 12 Rule 6, Order 15 Rule 1, Order 15 Rule 2
Financial Institutions Act, 1993 — Section 19(7), 25(b), 29
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (2010) 4 BC 399

Hon'ble Judges : Ranjan Gogoi, J; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : D.K. Mishra, A. Dutta and K. Goswami, for the Appellant; H. Talukdar, L. Talikdar and G. Das, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The Petitioner, who was the Defendant No. 2 in Money Suit No. 2 of 1990 filed in the Court of the learned Additional Deputy Commissioner (Judicial), Mon, Nagaland by the State Bank of India, Naginimora Branch, the Respondent No. 3 herein has by the present petition challenged the proceeding pending before the learned Debts Recovery Tribunal, Guwahati, initiated against him amongst other Defendants in the suit for realization of an amount of Rs. 15,76,768.01 in terms of the judgment and decree dated 25th May, 1994 passed by the Additional Deputy Commissioner (Judicial).

2. The facts relevant for the purpose of the present writ petition may be noticed as under:

The State Bank of India-Respondent No. 3 filed Money Suit No. 2 of 1990 against the present Petitioner and three others (who are Respondent Nos. 4, 5 and 6 in the present writ petition) for realization of a sum of Rs. 15,76,768.01 together with interest contending, inter alia, that the present Respondent Nos. 4, 5 and 6,

who were the principal debtors had failed to repay the loan amount. It has further been contended in the plaint that the present Petitioner was the guarantor in respect of the said loan and agreeing to pay the Bank the loan amount in the event the principal debtors are unable to pay the loan amount. In the said suit though the Petitioner entered appearance on 6.9.1991 and filed an application on 11.9.1991 praying for time to file written statement, however, did not appear before the Court thereafter. The principal debtors (Respondent Nos. 4, 5 and 6), however, filed the written statement admitting the claim of the Plaintiff Bank and prayed for allowing them to repay the loan on instalment and with simple interest. The prayer of the said Defendants for simple interest, however, was contested by the Bank stating that the interest to be awarded in terms of the contractual rate of interest. On the basis of such admission in the written statement filed by the Defendant Nos. 1, 3 and 4 (Respondent Nos. 4, 5 and 6 in the writ petition) the learned trial Court by judgment dated 25.5.1994 decreed the suit of the Plaintiff for an amount of Rs. 15,76,768.01 with interest at the rate of 12 1/2% with quarterly rest with effect from 21.3.1990.

3. The Plaintiff Bank, thereafter, filed an application before the Recovery Officer-Debts Recovery Tribunal, for issuance of a certificate u/s 19(7) of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993, which has been registered as O.A. No. 38 of 1999, wherein notices were issued to all the Defendants in the said suit including the present Petitioner, who however, did not contest such proceeding. The Certificate was thereafter directed to be issued vide order dated 18.2.2000 against all the Defendants in the suit including the present Petitioner. Since the decree has not been satisfied, warrant of arrest was thereafter issued against the present Petitioner in the month of June, 2005 and the Petitioner has obtained the order for pre-arrest bail on 20th June, 2005. According to the Petitioner, he, for the first time, on issuance of such warrant of arrest came to know about the Certificate issued against him for realization of the decretal amount as decreed vide judgment and decree dated 25.5.1994. The Petitioner, therefore, has filed the present writ petition challenging the proceeding before the learned Debts Recovery Tribunal and the Certificate issued on such proceeding for realization of the said amount against him contending that the judgment and decree passed on 25.5.1994 in Money Suit No. 2 of 1990 being the decree passed under Order 12 Rule 6, CPC does not bind him. The Petitioner has also in the present writ petition challenged Section 25(b) and Section 29 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 and also the violation of the procedure in issuing the Certificate.

4. We have heard Mr. D.K. Mishra, learned Senior Counsel appearing for the writ Petitioner and Mr. L. Talukdar, learned Counsel appearing for the Respondent Bank. None appears for the other Respondents who are the principal debtors despite service of notice.

5. Mr. Mishra, learned Senior Counsel for the Petitioner, referring to the records of Money Suit No. 2/90 as well as the provisions of Order 12 Rule 6, CPC has

submitted that since the learned trial Court in view of non-filing of the written statement by the present Petitioner did not proceed to pass a judgment against him as required under Order 8 Rule 5(2) of the Code of Civil Procedure, the decree passed on the basis of admission by the principal debtors being Defendant Nos. 1, 3 and 4 under Order 12 Rule 6 cannot bind the Petitioner who is the Defendant No. 2 in the suit. It has further been submitted by Mr. Mishra, that under Order 15 Rule 1, CPC the Court can pronounce judgment at once when parties to the suit are not at issue on any question of law or fact. In the event any of the Defendants, when there are more than one, is not in issue on any question of law or fact the Court can also pass a decree against such Defendant and proceed against other Defendants under Order 15 Rule 2, Code of Civil Procedure. In the instant case, according to Mr. Mishra, no decree was passed by invoking the provisions of Order 15 Rule 1 as the Petitioner did not file any written statement, since passing of a judgment under Order 15 Rule 1 requires filing of a written statement or admission of the claim of the Plaintiff by his Advocate. Mr. Mishra further submits that though the learned trial Court had the jurisdiction to proceed under Order 15 Rule 5(2), CPC in view of non-filing of written statement by the present Petitioner no judgment, however, has been passed by the learned trial Court by invoking the said provision of law. Mr. Mishra, therefore, submits that the proceeding initiated before the learned Debts Recovery Tribunal and the Certificate issued by the Recovery Officer against the Petitioner is contrary to law and hence required to be interfered with.

6. Mr. Talukdar, learned Counsel appearing for the Respondent-Bank, relying on the provisions of Order 8 Rule 5(1), CPC has submitted that the admission by a Defendant may be by filing written statement or by the learned Counsel representing such Defendant or by not filing the pleadings at all and hence the decree passed on admission under Order 12 Rule 2, CPC also binds such of the Defendants who have not filed the written statement, as non-filing of such written statement amounts to admission of the claim of the Plaintiff Mr. Talukdar, in support of his contention has placed reliance on a decision of the Karnataka High Court in *M. Jeetendar Gandhi v. Huthappa and Ors.* AIR 1999 Kar 453.

7. We have considered the submissions advanced by the learned Counsel for the parties and also perused the records including the judgment and decree dated 25.5.1994 passed by the learned Trial Court in Money Suit No. 1 of 1990.

8. It appears from the records of Money Suit No. 2 of 1990 that though the present Petitioner, who was the Defendant No. 2 in the suit initially entered appearance on 6.9.1991 and thereafter filed an application praying for time to file written statement, neither the written statement has been filed nor he has contested the proceeding thereafter. The learned trial Court despite that fact did not pass any order to proceed *ex parte* against the present Petitioner. The learned Court below which is authorized to proceed under Order 8 Rule 5(2), CPC in view of non-filing of the written statement by the present Petitioner, also did not pass any judgment on the basis of the facts contained in the plaint and

decreed the suit as against the present Petitioner who did not contest. The learned trial Court, however, proceeded with the suit and on 25.5.1994 passed the judgment and decree on the basis of the written statement filed by the principal debtors who were the Defendant Nos. 1, 3 and 4 in the suit. In the written statement, as noticed above, the principal debtors admitted their liability and pleaded for payment of the amount due and payable by them in instalments. The learned trial Court, as it appears from the judgment dated 25.5.2004, has decreed the suit of the Plaintiff by invoking the jurisdiction under Order 12 Rule 6, CPC as the suit of the Plaintiff has been decreed as against those Defendants on admission.

9. Order 15 Rule 1, CPC which also empowers the Court to pronounce a judgment at once where at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact. Whether the parties in a suit are not at issue on any question of law or fact is to be decided after filing of the written statement under Order 10 Rule 1, Code of Civil Procedure. Rule 2 of Order 15 further provides that where there are more Defendants than one and any one of the Defendants is not at issue with the Plaintiff on any question of law or fact, the Court may at once pronounce the judgment against such Defendant and the suit shall then proceed only against other Defendant(s).

10. In the instant case, the learned trial Court has passed the decree on 25.5.1994 on the basis of the admission made by the principal debtors, who were the Defendant Nos. 1, 3 and 4 in the suit, in their written statement. The present Petitioner who was the Defendant No. 2 in the suit, however, did not file any written statement. Since the three Defendants out of total four in the suit did not have any dispute on any question of fact or law, the Court had the option to proceed against the present Petitioner under Order 15 Rule 2, CPC which has not been done. That being the position the non-filing of the written statement by the present Petitioner would not amount to the admission so as to pass a decree under Order 12 Rule 6, CPC and so as to bind such Defendants by the decree passed on admission as against other Defendants. The decision of the Karnataka High Court in *M. Jeetendar Gandhi (supra)* being on the basis of the legal presumption to be drawn in view of Section 118 of the Negotiable Instruments Act, 1881 is not applicable in the cases in hand.

11. In view of the aforesaid discussion the judgment and decree dated 25.5.1994 being against the principal debtors (Respondent Nos. 4, 5 and 6) does not bind the present Petitioner. There is no decree passed against the Petitioner and hence the Certificate issued and all subsequent action taken by the learned Debts Recovery Tribunal as against the present Petitioner, for recovery of the amount under the admission decree passed against the principal debtors, is contrary to law and hence set aside. The Debts Recovery Tribunal, however, may proceed against the principal debtors/Respondent Nos. 4, 5 and 6 in the writ petition.

12. In view of the aforesaid decision the other questions as raised are not gone into being not required. The writ petition is accordingly allowed. No cost.