
(2009) 03 OHC CK 0031
In the Orissa High Court

Krishna Singh

APPELLANT

Vs

The Branch Manager, SBI and Others

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (2009) 107 CLT 754 : (2009) 2 OLR 772 Supp

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanju Panda, J.—This Civil Revision is directed against the Order Dated 26.3.1996 passed by the Learned Civil Judge (Senior Division), Talcher in Misc. Case No. 178 of 1992 arising out of Execution Case No. 2 of 1988.

2. The brief facts of the case are as follows:

The Petitioner is Judgment-debtor No. 3 in Money Suit No. 15 of 1986 filed by Opposite Party No. 1-Bank for recovery of Rs. 1,70,447.69 ps. from Opposite Party No. 2. Said Opposite Party No. 2 applied for a Mid Term Loan to purchase a second-hand truck of 1975 Model. The Bank granted such loan and executed an agreement on 25.11.1980 for Mid; Term Loan with hypothecation of the vehicle. The present Petitioner is one of the guarantors in the said agreement As the loanee failed to re-pay the loan amount, the Bank filed the suit in the year 1986 for recovery of the same. The loanee and the other guarantor were set ex parte. The present Petitioner filed his written statement stating therein that his signature in the agreement was obtained fraudulently by the brother of the loanee as he was an employee of the Bank. He further stated that since the loan amount was insured with the Credit Guarantee Corporation of India (in short "CGCI"), the CGCI is liable to pay 25 per cent of the loan amount. The suit was decreed against the loanee as well as the guarantors making them liable to pay the loan amount jointly and severally. The Bank filed execution case for

executing the decree.

3. In the execution case, the loanee and the other guarantor, (present Opposite Parties 2 and 3 respectively) were set ex parte. The present Petitioner filed his objection u/s 47 of the CPC stating therein that the Plaintiff cleverly had not made CGCI a party to the suit though it was a necessary party. The money in question which was advanced to the loanee was duly insured with the CGCI. Therefore, CGCI should be added as a party in the execution proceeding. The execution proceeding was not maintainable in absence of a necessary party. The CGCI had already paid 75 per cent of the loan Rs. 70,000 putting the truck into auction, there is nothing to be realized from the Petitioner. The Bank while denying the fact of payment of 75, per cent of the loan amount by CGCI to it (Bank) stated that in the meantime said CGCI has extinct and a new company, namely, DICGC is in existence and the Petitioner being a guarantor is liable to repay the amount of Rs. 2,16,661 to the Plaintiff as outstanding dues.

4. The Learned Civil Judge after hearing the parties held that the money decree was passed against the Petitioner as he was a guarantor and the execution case was filed against him wherein he was Judgment debtor No. 3. It was further held by the Learned Civil Judge that the CGCI was not a party to the suit and since that was not challenged during pendency of the suit, in the execution case, the said point need not be gone into and the Petitioner has also not proved whether 75 per cent of the loan amount guaranteed by the CGCI had been deposited with the decree holder Bank and the same fact was not proved. Therefore, the said question should not be raised as an objection in the execution case. On the above finding, the Learned Civil Judge rejected the petition filed by the Petitioner u/s 47 of the Civil Procedure Code.

5. The Petitioner has challenged the aforesaid order in this civil revision on the ground that without filing a final decree proceeding a money decree cannot be executed, as the decree passed in the suit is a preliminary decree and a preliminary decree can never be executed unless final decree is passed. This is a question of law which can be raised at any time even though the same was not raised in the Court below. Learned Counsel for the Petitioner further submitted that this being the jurisdictional error, the impugned order is illegal and hence it is liable to be set aside.

6. Learned Counsel for Opposite Party No. 1-Bank submitted that as the Petitioner stood as one of the guarantors and a money decree was passed against him, he is jointly and severally liable to pay the amount along with the borrower. Therefore, the Bank has rightly executed the decree since the borrower executed the hypothecation agreement and the Petitioner was one of the guarantors and earlier the Petitioner had filed Civil Revision No. 633 of 1991 before this Court which was disposed of on 20th January, 1992 with the observation that JDr No. 3 can raise his objection before the executing Court regarding attachment of his salary for realization of the loan amount.

7. This Court considered the rival submissions of the parties, as stated above and verified the records. The suit was filed for recovery of money and it was decreed against the Petitioner (Guarantor) making him jointly and severally liable to pay the loan amount. In a case of hypothecated goods, the Court is right in passing a money decree and the hypothecated goods can be sold in the execution proceeding. The Trial Court in the decree directed Defendant No. 3 to hand over the truck within two months failing which the Plaintiff was to take steps through Court to get possession of the truck which was hypothecated with the Plaintiff-Bank. Accordingly, the truck was taken over and auctioned. In the present case, since the Bank has already accounted for the amount taking the particulars of the Book of Accounts in which detailed accounts had been kept, the same shall be taken as a prima facie evidence of truth of the matter with liberty to the parties interested to take such objection thereto. The Defendants have not been able to dislodge the said facts. The account statement of the decree-holder is not in dispute. Hence, the question of non-executability of a preliminary decree does not arise.

8. Therefore, this Court is not inclined to interfere with the impugned order. Accordingly, the civil revision is dismissed.