

(1990) 04 OHC CK 0029

In the Orissa High Court

Case No : Civil Revision No. 618 of 1989

Nikunja Kishore Pradhan

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 20-04-1990

Acts Referred:

Contract Act, 1872 — Section 128, 137
Income Tax Act, 1961 — Section 172

Citation : (1990) 70 CLT 416

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : B. Rath, for the Appellant; M.M. Das, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The core question that arises for determination in this case is whether the decree-holder should b"e directed to first proceed against the principal debtor for realisation of the decretal dues before proceeding against the guarantor.

2. In this revision petition, a challenge is raised to the order dated July 12, 1989, of the Subordinate Judge, Talcher, in Execution Case No. 2 of 1984 whereby he rejected the petitioner"s application for the aforementioned direction to the decree-holder. The relevant facts giving rise to the present proceeding may be shortly stated as follows :

Opposite party No. 1, State Bank of India, represented by its branch manager at Talcher filed Money Suit No. 15 of 1986 in the court of the Subordinate Judge, Talcher, against the petitioner, Nikunja Kishore Pradhan, as defendant No. 2, opposite party No. 2, Bidhu Bhusan Pattnaik, as defendant No. 1 and opposite party No. 3,, Krishna Singh, as defendant No. 3 for realisation of Rs. 1,70,447.69 on the basis of the mid-term loan of Rs. 1,44,500 advanced to opposite party No. 2 for purchase of the truck bearing registration No. OSC 9257. The petitioner and

opposite party No. 3 were the guarantors for the said loan. Under the agreement entered into between the parties, the aforementioned truck was hypothecated with the bank. Opposite party, No. 2 having defaulted in payment of instalments, the bank filed the suit for realisation of the amount due to it as per the agreement. The learned Subordinate Judge, by his judgment dated October 24, 1987, decreed the suit ex parte against defendant No. 1 (opposite party No. 2) and, on Contest against defendants Nos. 2 and 3 (petitioner and opposite party No. 3), held that the plaintiff was entitled to recover Rs. 1,70,447.69 together with pendente lite and future interest; defendant No. 3 who had taken the truck in zima was directed to hand over the truck within one month failing which the plaintiff was to take steps through the court to get possession of the truck ; the plaintiff was to take steps to sell the truck which was hypothecated to it and to adjust the sale proceeds towards payment of the decretal amount and, in case the sale proceeds were not sufficient, the, plaintiff was to realise the balance amount from the defendants. It was held by the court that all the defendants were jointly and severally liable for the decretal amount and the plea taken by the guarantors (defendants Nos. 2 and 3) that their signatures had been taken by playing fraud was negatived.

3. Thereafter, the bank filed Execution Case No. 2 of 1984, took steps to sell the hypothecated truck, adjusted the sum of Rs. 70,301 obtained as sale proceeds and, thereafter, took steps to attach the truck of the petitioner bearing registration No. OSS 5796 for realisation of the balance decretal amount. At this stage, the petitioner filed an application for a direction to the decree-holder to realise the decretal dues from the properties of the principal debtor before proceeding against him. The application was rejected by the learned Subordinate Judge holding that, in terms of the decree, the plaintiff-decree-holder is at liberty to realise the decretal dues from all the defendants-judgment-debtors.

4. Shri B. Rath, learned counsel appearing for the petitioner, placing strong reliance on the decision of the Supreme Court in *Union Bank of India Vs. Manku Narayana*, , and the decision in *A firma "Agenda Nacional Limitada" v. A. Sociedade "Chowgule and Cia Limitada"* AIR 1967 Gau 88, and *Lima Leita and Co. Ltd. v. Union of India* [1968] 70 ITR 518 : AIR 1968 Goa 29, urged that the liability of the guarantor comes into existence only on default by the principal debtor. Shri M.M. Das, learned counsel appearing for the opposite party-bank, relying on the decision of this court in the case of *Orissa Agro Industries Corporation Ltd. and Others Vs. Sarbeswar Guru and Others*, , and the stipulations in the decree in the present case, submitted that it is open to the decree-holder to proceed against either the principal debtor or the guarantors or any one of the guarantors.

5. In the facts and circumstances of this case, the contention raised on behalf of the petitioner has no substance. As noticed earlier, it has been held by the learned Subordinate Judge in the judgment that the defendants, that is, the principal debtor and the guarantors, were jointly and severally liable for the amount due to the bank; and, accordingly, a decree was passed with the specific

direction that the decree-holder will first proceed to sell the hypothecated truck and after adjusting the sale proceeds, if any amount remained outstanding, then proceed to realise it from the defendants. No material has been brought to my notice to show that there was any agreement between the bank and the guarantors that the liability of the latter will come into existence only after the bank failed to realise the decretal dues from the principal debtor. Therefore, in the absence of any agreement between the parties and, in view of the specific finding in the judgment and the direction in the decree, there is no escape from the position that the decree-holder has the choice to proceed either against the principal debtor or both the guarantors or any one of them for realisation of the balance decretal dues. The learned Subordinate Judge was, therefore, right in rejecting the application filed by the petitioner.

6. Coming to the decision cited by learned counsel for the parties, in *Union Bank of India Vs. Manku Narayana*, , the court observed that where the decree in execution is a composite decree personally against the principal debtor and the guarantor and also against the mortgaged property, and 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. The ratio in this case does not help the petitioner since, as per the direction in the decree, the hypothecated truck was sold and the sale proceeds were adjusted towards the decretal amount before the decree-holder proceeded to realise the balance amount from the present petitioner.

7. In *Lima Leitaio and Co. Ltd. v. Union of India* [1968] 70 ITR 518 : AIR 1968 Goa 29, the court; interpreting the terms of the guarantee bond executed between the parties, held that in" case the principals are not liable to pay the tax u/s 172 of the Income Tax Act, 1961, the petitioner-company would then be absolved from all liability to pay the tax assessed and later demanded by respondent No. 2 in terms of the guarantee bond ; there can be no default when there is no liability and the liability is to be restricted on the bond consistent with its recitals and there can be no contract of guarantee if liability does not exist. This principle has no application at all to the present case since the decree has held all the defendants, the principal debtor and the guarantors, jointly and severally liable for the dues of the bank.

8. In *A firma "Agencia Nacional Limitada" v. Sociedade "Chowgule and Cia Limitada* AIR 1967 Gau 88, it was held that it is the essence of the contract that there should be someone liable as principal and, accordingly, where one party agrees to become responsible for another, the former incurs no obligations as surety if no valid claim ever arises against the principal, while, on the other hand, the liability of the surely upon a claim which is good as against the principal ceases as soon as the claim is extinguished. A surety also cannot be compelled to pay the sum assured unless the creditor first realises the debt due from the properties of the principal debtor except in the case contemplated by Section 830 of the Portuguese Civil Code. There is no such pan materia statutory

provision or contractual obligation applicable to the present case. The ratio in the decided cases is, therefore, of little assistance.

9. In the decision in Orissa Agro Industries Corporation Ltd. and Others Vs. Sarbeswar Guru and Others, , relied upon by Sri M. M. Das, it was expressly observed that the creditor can sue both the debtor and surety together or he can sue the surety alone ; likewise, where he has sued both and obtained a decree, he can in execution proceed against the surety in the first instance ; if the creditor had the option of suing the surety or any one of them without impleading the principal debtor in the suit, it cannot be said that the dismissal of the suit under Order 9, rule 5, Civil Procedure Code, against the principal debtor would automatically discharge the liability of the surety for the agreed amount in question. In support of this view, reliance was placed on the provisions of sections 128 and 137 of the Contract Act and the decisions in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, and Punjab National Bank Vs. Mehra Brothers (P) Ltd. (in liqn.) and Others, . "Referring to the terms of the agreement in that case, it was observed that the agreement did not contain any stipulation to the effect that the creditor must exhaust his remedies against the principal debtor first before proceeding against the surety and that once the liability of the surety arises, it is co-extensive with that of the principal debtor and the surety becomes liable to pay the entire amount. On the facts of the present case discussed earlier, the ratio in this case squarely applies.

10. On the aforesaid analysis, the revision petition being devoid of merit is dismissed, but in the circumstances of the case, without any order for costs.