

(2011) 09 CAL CK 0037

In the Calcutta High Court

Case No : A.P.O.T. No. 294 of 2011, G.A. No. 2332 of 2011 and E.C. No. 134 of 2011

Rajiv Garg

APPELLANT

Vs

L and T Finance Ltd. and Another

RESPONDENT

Date of Decision : 14-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 51, 58, 58(1)
Contract Act, 1872 — Section 126, 128

Citation : (2011) 5 CHN 462

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Amitava Das and A.B. Dutta, for the Appellant; Samit Talukdar, Aniruddha Mitra, Paritosh Sinha and Sachchidananda Pandey, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a judgment-debtor and is directed against an order dated June 28, 2011, passed by a learned Single Judge of this Court by which His Lordship, in connection with the execution of a decree for recovery of money, passed a direction for arrest of the Appellant, who was a guarantor for the loan advanced to the other judgment-debtor, for the maximum period indicated in Section 58(1)(a) of the Code of Civil Procedure, after, however, giving an opportunity to the Appellant to pay off the decretal amount within a specified period.

2. While passing such order, His Lordship specifically recorded that it did not appear from the materials on record that the Appellant had any asset, but in spite of such finding, His Lordship was of the view that there was No. bona fide offer or attempt by the Appellant to pay off the amount of decretal amount or even part thereof.

3. Being dissatisfied, the Appellant, the judgment-debtor No. 2, has come up with the present appeal.

4. Mr. Das, the learned Advocate appearing on behalf of the Appellant, strenuously contended before us that none of the conditions as provided in the proviso to the Section 51 of the Code has been satisfied in this case and thus, the learned Single Judge acted without jurisdiction in passing an order of arrest. According to Mr. Das, mere impecunious condition of a judgment-debtor cannot land him in civil imprisonment when none of the conditions mentioned in Section 51 has been proved.

5. Mr. Talukdar, the learned Senior Advocate appearing on behalf of the decree-holder, on the other hand, has opposed the aforesaid contention of Mr. Das and has contended that the Appellant, being indisputably a guarantor of the loan advanced to the judgment-debtor No. 1, had the obligation to account for the money due and payable by the judgment-debtor No. 1 in fiduciary capacity as a guarantor, and thus, the Appellant came within the purview of the phrase "that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account". In support of such contention, Mr. Talukdar strongly relied upon the decision of a learned Single Judge of the Karnataka High Court in the case of Shankerappa v. The Thungabhadra Grameena Bank, Mudagal and Anr., reported in AIR 2000 Kar 326. Mr. Talukdar contends that in view of the assurance given by the Appellant that in case of inability of the judgment-debtor No. 1 to pay back the amount, he would return the amount, his client agreed to advance the loan. In other words, according to Mr. Talukdar, a guarantor is bound in a fiduciary capacity towards the creditor to account for the loan and thus, the case before us comes within the purview of Clause (c) of the first proviso to Section 51 of the Code. Mr. Talukdar also relies upon a decision of a Division Bench of this Court in the case of Tulsidas Mundhra Vs. The Official Liquidator and Others, .

6. Mr. Talukdar, thus, prays for dismissal of this appeal.

7. Therefore, the sole question that arises for determination in this appeal is whether in this case, any of the conditions for passing an order of arrest by civil imprisonment as mentioned in Section 51 of the Code has been fulfilled in the facts of the present case.

8. In order to appreciate the said question, it would be appropriate to refer to the provisions contained in Section 51 of the Code as applicable to the State of West Bengal and the same is quoted below:

51. Powers of Court to enforce execution.-Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

(a) by delivery of any property specifically decreed;

(b) by attachment and sale of any property;

(c) by arrest and detention in prison 1[for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that

section;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, is satisfied-

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Provided also that the Court of Small Causes of Calcutta shall have No. power to order execution of a decree by attachment and sale of immovable property or by appointing a receiver in respect of such property.

Explanation.-In the calculation of the means of the judgment-debtor for the purposes of Clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

9. After hearing the learned Counsel for the parties and after going through the materials on record, we find that this is not a case where the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree is likely to abscond or leave the local limits of the jurisdiction of the Court, or has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, nor is it a case where the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same because the learned Single Judge has himself specifically recorded that it did not appear from the materials on record that the Appellant had any asset.

10. Therefore, there can be a lawful order of civil imprisonment only if the case comes within the purview of Clause (c) of the first proviso to Section 51 as

mentioned earlier.

11. We, accordingly, propose to consider whether a guarantor in a loan transaction by virtue of his being a surety is bound in a fiduciary capacity towards the creditor to account for the loan.

12. In order to appreciate the question, we should first take into consideration the position of a guarantor as provided in Section 126 of the Contract Act and the extent of his liability as provided in Section 128 thereof which are quoted below:

126. "Contract of guarantee", "surety", "principal debtor" and "creditor"-A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

128. Surety's liability.-The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

13. Thus, a guarantor by virtue of a contract of guarantee takes upon himself the duty to perform the promise or to discharge the liability of a third person in case of a default by such third party and his liability is merely co-extensive with that of the principal debtor unless otherwise provided by the contract. But simply in view of such contract, a guarantor does not place himself in a fiduciary capacity towards the creditor and consequently, has although the liability to account exactly like the one of the principal debtor, he does not stand in a fiduciary capacity in relation to the creditor.

14. In our opinion, a fiduciary relationship exists in a relation like trustee-beneficiary, guardian-ward, principal-agent, attorney-client, executor-legatee etc., where it requires a highest degree of care and protection of the property or interest of the latter entrusted to the former. If there is No. entrustment of any property or interest of X in Y, the latter has No. liability to account for the same to the former in a fiduciary capacity. Thus, by virtue of a simple contract of guarantee, No. property of the creditor being entrusted to the surety, the latter has No. higher liability to account to the creditor than that of the principal debtor in the matter of payment of the debt.

15. In this connection, we may profitably refer to a decision of a Three-Judge-Bench of the Supreme Court in the case of Prem Ballabh Khulbe Vs. Mathura Datt Bhatt, where the Supreme Court was dealing with a case of prayer of civil imprisonment against a defaulting partner at the instance of another partner who got a decree for recovery of money and in that context, it was held that a partner must observe the utmost good faith in his dealings with the other partners and is bound to render accounts of the partnership assets in his hands.

But in the absence of special circumstances, he cannot be regarded as a kind of trustee for the other partners or liable to render accounts to them in a fiduciary capacity within the meaning of Section 51 of the Code. The Supreme Court in that case quoted with approval the following observations of Halsbury's Laws of England, 3rd Edition, in that regard as consistent with the provisions of the Indian Partnership Act, 1932 and the Indian Trusts Act, 1882:

Partnership itself does not create a fiduciary relation between the partners or make one of them a trustee for the other or for his representatives. The relation may, however, arise on the death of one of them or be created by other special circumstances.

16. In our opinion, if a partner is not treated to be a person in a position of fiduciary capacity in the matter of dealing with the property of partnership in the absence of special circumstances, a mere guarantor, if is unable to pay off the debt of the principal debtor due to his impecunious circumstances, cannot be put to civil imprisonment for such inability to meet with the contractual liability by treating him as person in fiduciary capacity to account for the decretal debt to the creditor.

17. In this connection, we may profitably quote the following observations of the Supreme Court in dealing with an application for civil imprisonment in the case of Jolly George Varghese and Another Vs. The Bank of Cochin,

It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of Daridra Narayan (land of poverty) is No. crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Section 51, CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

19. We, therefore, hold that a creditor has No. right to pray for civil imprisonment of the guarantor in the absence of compliance of the circumstances mentioned in Section 51 of the Code and mere inability of a guarantor to meet his contractual liability towards the creditor will not enable the latter to pray for such imprisonment by treating him as a person in fiduciary capacity bound to account for the loan given to the principal debtor.

20. With great respect to the learned Judge of the Karnataka High Court we are unable to accept the proposition laid down in the case of Shankerappa v. The Thungabhadra Grameena Bank, Mudagal and Anr. (supra). It appears that in the said decision, the learned Single Judge did not take into consideration the aforesaid decisions of the Supreme Court and the decision of the Kerala High

Court in the case of Velayudhan v. State Bank of India, reported in 1988 (1) K.L.T 491 relied upon by His Lordship in the said decision was subsequently overruled by the Division Bench of that Court in the case of Francies v. Central Bank of India, reported in 1990 (2) K.L. T. 983.

21. The other decision cited by Mr. Talukdar in the case of Tulsidas Mundra (supra), dealt with a case where the question was whether a director of a company stands in a fiduciary capacity in relation to the members of the Company of which he is a director. Such a question was answered in the affirmative. But the said decision cannot be extended to a case of a director who stood as a guarantor for the company so as to place the director in a fiduciary capacity also in relation to the creditor of the company.

22. In the said case of Tulsidas Mundra (supra), the following observations of the Division Bench are relevant for holding the director as in a fiduciary capacity with relation to the members of the company:

In this case on this aspect we are in respectful agreement with the observations of the Division Bench of the Madras High Court where the Madras High Court expressed the view that if a director occupied a fiduciary position in relation to the members of a company, he was liable to account to them. It seemed that his liability to account flowed from his fiduciary position which required him to hold the property of the company over which he had control for the benefit of the members of the company.

23. Thus, the said principle does not apply to a case of a simple contract for guarantee where there is No. entrustment of any property or right of the creditor upon the guarantor so as to bring the former in a fiduciary capacity with the latter.

24. On consideration of the entire materials on record, we find that the learned Single Judge erred in law in directing civil imprisonment of the Appellant notwithstanding the fact that the conditions mentioned in Section 51 of the Code have not been satisfied.

25. We, accordingly, set aside the order impugned of civil imprisonment. This order will not stand in the way of the decree-holder in seeking other remedy available under the law for execution of the decree.

26. The appeal is, thus, allowed.

27. In the facts and circumstances, there will be, however, No. order as to costs.

I agree.

Later:

Photostat certified copy of this judgment be made available to the parties within a week from today upon compliance of usual formalities.