

(2014) 02 TP CK 0006

In the Tripura High Court

Case No : Writ Petition (C) No. 289 of 2004

**Sri Sukumar Debbarma Vs The State of Tripura, Tripura Scheduled Tribes
Cooperative Development Corporation Limited and Sri Subhash
Debbarma**

Date of Decision : 03-02-2014

Acts Referred:

Contract Act, 1872 — Section 128

Citation : (2014) 02 TP CK 0006

Hon'ble Judges : S. Talapatra, C.J

Bench : Single Bench

**Advocate : Somik Deb, for the Appellant; J. Majumder, Advocate for the
Respondents No. 1 and 2, for the Respondent**

Final Decision : Dismissed

Judgement

Subhasis Talapatra, C.J.—The undisputed facts unfolded in the writ petition are that the respondent No. 4 had obtained a loan to the extent of Rs. 3,07,800 by virtue of the memorandum dated 19.12.1998 (Annexure-P/3 to the writ petition) and the petitioner herein stood as the guarantor on executing the instrument styled as the letter of guarantee (Annexure-R/3 to the counter-affidavit filed by the respondents No. 1 and 2) and also authorising the Inspector of Schools, Bishalgarh by the letter (Annexure-R/2 to the counter-affidavit filed by the respondents No. 1 and 2) that, if the borrower failed to repay the loan amount with interest accrued thereof partly or fully, deduction may be made from his monthly pay bill for repayment of the loan or interest of the said borrower till the full recovery of the said loan is made. The General Manager of the respondent No. 3 by the letter dated 22.08.2001 (Annexure-P/2 to the writ petition) had asked the petitioner for repayment of the outstanding amount to the extent of Rs. 2,56,500 as on 31.07.2001 alongwith interest to the extent of Rs. 20,982 as on 31.03.2001 as the respondent No. 4 had not been repaying the instalments in terms of the sanction letter and the loan agreement.

2. It has not been disputed by the petitioner that he had executed the letter of

guarantee (Annexure-R/3 to the counter-affidavit filed by the respondents No. 1 and 2) taking the responsibility of repayment of the full loan amount with interest or the outstanding thereof on account of failure of the respondent No. 4 in making the repayment.

3. The General Manager of the respondent No. 3 by a letter dated 10.10.2001 (Annexure-R/4 to the counter-affidavit filed by the respondents No. 1 and 2) had requested the Inspector of Schools (the Drawing and Disbursing Officer for the petitioner) to recover a sum of Rs. 3,000 per month from the salary bill of the petitioner till the amount of Rs. 2,77,482 as on 31.03.2001 was recovered. The Inspector of Schools had also received a reminder from the said General Manager of the respondent No. 3 in the form of a letter dated 04.02.2002 (Annexure-R/5 to the counter-affidavit filed by the respondents No. 1 and 2). Thereafter, the Inspector of Schools, by the memorandum dated 24.04.2002 (Annexure-R/6 to the counter-affidavit filed by the respondents No. 1 and 2) has made the following order:

So on the strength of the undertaking executed by the employees concerned at the time of his/her availing of the loan, we have been requested by the Bank Authority to effect Recovery of such dues from his/her salary month of April, 2002 payable in May, 2002 onwards till the Recovery outstanding Loan is completed @ Rs. 3,000/- (Rupees Three thousand) only per month and will remit the same to the respective Bank by the undersigned in due time.

4. The petitioner did not raise any objection, at least no record has been placed before this court except Annexure-5 to the writ petition, which is a representation made to the Director of School Education, Govt. of Tripura (the respondent No. 2 herein) on February, 2004, stating that "Unfortunately, from May, 2002 monthly deduction @ Rs. 3,000/- is being effected from my salary. The said deduction are being made without giving any copy of any order of deduction. I state that the order of deduction is illegal, unwarranted and without any authority of law. I state that I am a poor Government employee and the deduction is causing severe hardships to me".

5. By filing this writ petition, the said guarantor has challenged the decision of recovery embodied in the letter dated 22.08.2001 (Annexure-P/2 to the writ petition). It appears that even after the representation dated February, 2004, it has been stated, that the petitioner had met the General Manager of the Corporation (the respondent No. 3 herein) and urged him to sell the hypothecated vehicle for realisation of the outstanding amount, but it did not appear from the records placed by the petitioner that he had raised any objection regarding the recovery in writing.

6. Be that as it may, the impugned decision contained in the letter dated 22.08.2001 (Annexure-P/2 to the writ petition) has been communicated by the General Manager of the Tripura Scheduled Tribes Cooperative Development Corporation Ltd. But, from the records it has surfaced that even though the writ

petition has been pending for over nine years, no step has been taken by the petitioner in respect of the respondent No. 3. That position has not been contested by Mr. Somik Deb, learned counsel appearing for the petitioner. For such non-prosecution, any relief claimed against the respondent No. 3 has been by implications abandoned.

7. Mr. Somik Deb, learned counsel appearing for the petitioner has submitted that the mode adopted by the respondents for realising the outstanding loan is entirely untenable inasmuch as the obligation of liquidating the loan primarily lies with the loanee not with the guarantor. More so, when there is collateral security or the hypothecation of the valuable stock or materials, the realisation has to be effected by way of auction for purpose of realising the outstanding amount and if, thereafter, it is found that the bank or the financial institution or any other person in the business of extending loan is entitled to realise any further amount they can slap their claim on the guarantor, not before that. In this case, Mr. Deb, learned counsel for the petitioner had continued to submit, the respondents, particularly the respondent No. 3, has not followed that procedure. Mr. Deb, learned counsel has further submitted that the respondents No. 1 and 2 were not privy to that contract and they does not have any obligation to act as an agent of the respondent No. 3 for recovering the outstanding loan amount. That apart, no notice was given by the respondents No. 1 and 2, apprising the petitioner that they were going to deduct the amount for purpose of liquidating the outstanding loan taken by the respondent No. 4. As such, the entire action of the respondents No. 1 and 2 is visited by arbitrariness and colourable exercise of power. The respondents No. 1 and 2 were not supposed to exercise the power beyond the province of the loan agreement.

8. Mr. J. Majumder, learned counsel appearing for the respondents No. 1 and 2 while refuting the submissions of Mr. Deb, learned counsel appearing of the petitioner, has categorically submitted that the letter of guarantee provides as follows:

3. The Guarantee is additional and without prejudice to any securities or obligations which the Corpn. may now or hereafter have from us, from the principal or from any one else in respect of any indebtedness or liabilities hereby guaranteed and all rights and remedies in respect thereof are reserved.

It has been further provided in the said letter of guarantee as under:

4. That Guarantee shall be a continuing Guarantee and shall not be considered as wholly or partly satisfied or exhausted by any payments from time to time made to the Corpn. or any settlement of any account or by reason of the account being brought to a credit at any time or from time to time or its being drawn open to the full extent or exceeding the full extent of the limit from time to time and 1st being reduced to extinguished and thereafter re-opened. The Guarantee shall continue in force notwithstanding the discharge of the Principal by operation of law or my death or the death of any one of us and shall cease only on payment

of the amount guaranteed there under either by me or any of us.

9. Having referred so, Mr. Majumder, learned counsel appearing for the respondents No. 1 and 2 has submitted that the mode of recovery in terms of the letter of guarantee has not been specified, but left to the discretion of the creditor corporation. When no particular mode is prescribed it is the option of the creditor bank or corporation how and in what mode they would realise the outstanding loan amount. Mr. Majumder, learned counsel has also submitted that the respondents No. 1 and 2 have acted on the authority given by the letter of authorisation (Annexure-R/2 to the counter-affidavit filed by the respondents No. 1 and 2), which provides thus:

In this regards I do hereby declare that if the borrower would fall to repay the loan amount with interest accrued thereof partly or fully of the said loan plus interest, deduction may be made from the monthly pay bill towards repayment of loan plus interest of the said borrower till the full recovery of the said loan.

10. Mr. Majumder, learned counsel appearing for the respondents No. 1 and 2 has further submitted that that position would get further clarified from the memorandum, Annexure-R/6 to the counter-affidavit filed by the respondents No. 1 and 2. What appears further is that before commencement of the recovery of the outstanding loan amount from the salary bill of the petitioner, the petitioner has been given the copy of the memorandum (Annexure-R/6 to the counter-affidavit filed by the respondents No. 1 and 2), but the petitioner admittedly has not raised any objection to such recovery.

11. It would be relevant to mention that the General Manager of the respondent No. 3 had approached the Inspector of Schools, Govt. of Tripura, Bishalgarh by the letter dated 10.10.2001 (Annexure-R/4 to the counter-affidavit filed by the respondents No. 1 and 2) and the reminder in the form of the letter dated 04.02.2002 (Annexure-R/5 to the counter-affidavit filed by the respondents No. 1 and 2) for recovery of the outstanding loan amount in terms of the letter of guarantee and the letter of authorisation. As such, it does not fit in the mouth of the petitioner to say that he has not been given any notice before the deduction had started from his salary bill. In view of clauses (3) and (4) of the letter of guarantee as reproduced, the petitioner cannot obligate the creditor bank or the corporation to follow a particular mode of recovery. Even there is no challenge as regards the quantum of the outstanding or in respect of the loan amount.

12. The apex court in Ram Kishun and Others Vs. State of U.P. and Others, has held in no uncertain terms as under:

10. There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the "Contract Act"), the liability of the guarantor/surety is coextensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the

principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance.

[Emphasis supplied]

13. Similarly the apex court has enunciated the law in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam and Another, , Union Bank of India Vs. Manku Narayana, and State Bank of India Vs. Messrs. Indexport Registered and others, . Confronted with this legal position, the challenge of the petitioner is bound to cave in. This writ petition thus merits no further consideration and accordingly it is dismissed.

There shall be no order as to costs in the circumstances of the case.