(1992) 05 OHC CK 0012

In the Orissa High Court

Case No : First Appeal No. 252 of 1988

State Bank of India APPELLANT

Vs

Sajita Engineering Works and Others RESPONDENT

Date of Decision : 04-05-1992

Acts Referred:
Contract Act, 1872 — Section 128

Citation : AIR 1992 Ori 237 : (1992) 2 OLR 84

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

Bench : Single Bench

Advocate : S.N. Sinha, for the Appellant; P.K. Routray and P.K. Mohanty and K.M. Mishra and D. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal by the plaintiff a bank in a suit for realisation of loan amount as the trial Court did not make the guarantor jointly and severally liable with the debtor.

2. Plaintiff bank is a creature of statute under the State Bank of India Act, 1955. Proprietor of defendant No. 1 applied for loan and defendants Nos. 2 and 3 by separate letters agreed to be guarantors for the proprietor. On that basis, cash credit loan to the extent of Rs. 1,40,000/- was granted to the proprietor. Terms and conditions were accepted by all the three. Proprietor of defendant No. 1 executed a demand promissory note on 10-2-1981 in favour defendants Nos. 2 and 3 who endorsed the same in favour of plaintiff. An agreement for cash credit was executed by Proprietor of defendant No. 1. Defendans Nos. 2 and 3 also executed a deed of guarantee on the same day; Proprietor operated the cash credit transaction. However, he did not pay the dues for which suit was filed to recover Rs. 1,76,193.31 paise with pendente lite and future interest.

3. Defendants Nos. 1 and 3 filed at joint written statement. They did not specifically dispute assertions of plaintiff. Since the industry was sick they

requested for payment by instalments.

4. Defendant No. 2 in his separate written statement has not specifically disputed plaint assertions. His case is that proprietor of defendant No. 1 has defrauded plaintiff. He is solvent. With the money taken from the bank, proprietor of defendant No. 1 has started different business activity. Since he is able to pay the dues, there is no liability of defendant No. 2.

5. One officer was examined by plaintiff bank as P.W. 1. He proved the documents market as Exts. 1 to 8. Proprietor of defendant No. 1 examined himself as D.W. 1. No witness was examined on behalf of defendant No. 2.

6. D.W. 1 in his deposition stated that he is prepared to pay back the dues in monthly instalment of Rs. 2,000/-. P.W. 1 stated that bank is willing to accept instalment at the monthly rate of Rupees 5,000/-. Trial Court decreed the suit against defendant No. 1 by directing payment of the decretal amount in monthly instalment of Rs. 4,000/-. It has dismissed the suit against defendants Nos. 2 and 3 on the following finding:

".......From the above discussion of evidence, it is clear that defendant No. 3 who is wife of defendant No. 1 and defendant No. 2 who was the guarantor, but in view of admission made by defendant No. 1 to pay the dues of the plaintiff in way of instalments defendants Nos. 2 and 3 although are guarantors now cannot be liable for the loan incurred by defendant No. 1 from the plaintiff bank....."

7. Mr. S.S. Sinha, learned counsel for the appellant submitted that request for payment of dues by instalments does not absolve the guarantors from their liability. He relied upon the decision reported in Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, , in support of his contention in respect of liability of a guarantor. His contention is that solvency of the debtor is not a ground for the surety or guarantor to avoid payment.

8. u/s 128 of the Contract Act, save as provided in the contract, liability of surety is co-extensive with that of the principal debtor. His liability is immediately. It is not deferred until the creditor exhausted his remedies against the principal. This has been observed in the aforesaid decision. It was further observed:

"........The Court rejected the prayer of the principal debtor for payment of the decretal amount in instalments as there was no evidence to show that he could not pay the decretal amount in one lump sum. It is therefore said that the principal was solvent. But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor u/s 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A gurantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down......."

9. This Court in the decision reported in 38 (1972) CLT 959 Nanda Dulal Sen v. Rao and Sons, relying upon the aforesaid decision of the Supreme Court held that liability of surety is co-extensive. But the decree against the surety cannot be executed till the principal debtor pays the dues by instalment granted by the Court under the Orissa Money Lenders Act. Liability of guarantors could not be thus, wiped off. Trial Court ought to have decreed the suit against defendants Nos. 2 and 3."

10. Learned counsel for defendant No. 2 respondent No. 2 relied upon the decision reported in Mahomedalli Ibrahimji Vs. Lakshmibai Anant Palande, . In the said decision question for consideration was whether compromise of the suit by the principal debtor to pay the dues by instalment has the effect of discharge of surety. Correctness of the decision requires no consideration in view of the decision of Supreme Court and of this Court. Decision reported in AIR 1930 Lah 896 Ram Chand Diwan Chand v. Sant Singh, relied upon by learned counsel for the respondents was rendered where by an arrangements between principal judgment-debtor and decree holder time for discharge of debt was extended by former. It was held that its effect on discharge of surety depends upon the discretion of the Court. This decision would not also influence me in view of the decision of Supreme Court and of this Court.

11. In conclusion suit is to be decreed against all the defendants who are jointly and severally liable for the amount decreed. However, decree directing payment of Rs. 4,000/- monthly by instalment till complied with by proprietor of defendant No. 1 would have the effect of suspension of action against the sureties. No sooner the principal debtor fails to comply with the direction to pay any monthly instalment, decree can be executed against all or any of the judgment-debtors.

12. In result, appeal is allowed. There shall be no order as to costs in this appeal.

