

GAHC010219172021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/147/2021

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD. (HUDCO)
(A FINANCIAL INSTITUTION REGD. UNDER THE COMPANIES ACT, 1956)
HAVING ITS REGD. OFFICE AT HUDCO BHAWAN, INDIA HABITAT CENTRE,
LODHI ROAD, NEW DELHI-110003 AND HAVING ITS REGIONAL OFFICE,
GUWAHATI AT HOUSEFED COMPLEX, RUKMINIGAON, G.S. ROAD,
GUWAHATI-781022 SUTHORISED SIGNATORY SRI SUBHASH GHOSH
(AGM) P.

VERSUS

PRANAB KUMAR SHARAMA AND 2 ORS.
S/O. LT. KABINDRA NATH SHARMA, R/O. P/09, PALMS ENCLAVE, BELTOLA,
GUWAHATI-28, DIST. KAMRUP (M), ASSAM, PIN-785122.

2:SMT. RITA MAZUMDAR @ SHARMA
D/O. RAMESWAR MAZUMDAR
R/O. ANUBHAV APARTMENT
BAISISTHAPUR
GUWAHATI-28
DIST. KAMRUP (M)
ASSAM
PIN-785122.

3:M/S LANDMARK ESTABLISHMENTS PVT. LTD.
A PVT. LTD. CO. INCORPORATED UNDER THE COMPANIES ACT
1956
HAVING ITS REGD. OFFICE AT LANDMARK BUILDING
M.G. ROAD
GUWAHATI-781009

Advocate for the Petitioner : MR. K BHATTACHARJEE

**Advocate for the Respondent : MR J SHARMA
: MR. G. DAS**

Date of Hearing : 22.05.2024

Date of Judgment : 22.05.2024

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Mr. K. Bhattacharjee, the learned counsel appearing on behalf of the Petitioner and Mr. J. Sharma, the learned counsel appearing on behalf of the Respondents.

2. This is an application under Article 227 of the Constitution challenging the order dated 11.11.2021 passed in Misc. (J) Case No.78/2020 arising out of Title Suit No.306/2018 whereby the learned Trial Court i.e. the Court of the learned Civil Judge (Senior Division) No.3, Kamrup (M) at Guwahati had rejected the application filed for rejection of the plaint in terms with Order VII Rule 11(d) read with Section 18 of the Recovery of Debt due to Banks and Financial Institutions Act, 1993 (for short "the Act of 1993")

3. For the purpose of deciding an application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (for short "the Code") the requirement of the law is to see as to whether from the statements made in the plaint, the suit is barred by any law. Therefore, this Court constricts itself to the averments made in the plaint as well as the documents enclosed therewith.

4. From a perusal of the copy of the plaint, it reveals that the Plaintiff Nos. 1 and 2 were admittedly Directors of the Defendant No.2. In the course of business, the Defendant No.2 had taken a loan of Rs.1.8 crores from the Defendant No.1 (the Petitioner herein) which was sanctioned vide sanction letter No.HUDCO/ZO-NE/LANDMARK/18725/2005/1987 dated 09.09.2005 by keeping the Schedule-A land to be the primary security and Schedule-B land and others as collateral securities as per the agreement executed between the Defendant Nos. 1 and 2 as well as the proforma Defendant No.3.

5. It was alleged in the plaint that at the time of taking the loan from the Defendant No.1, various printed documents were required to be signed by the Plaintiffs as Directors of the Defendant No.2. There were also some documents for creation of mortgage of the Schedule-A land which were signed by the Plaintiffs as Directors of the Defendant No.2 and the proforma Defendant No.3 as land owner of the land. Besides, there was also a collateral security created in respect to the plot measuring 1 Bigha as described in Schedule-B to the plaint. The Schedule-B land belonged to the plaintiffs who were the Directors of the Defendant No.2. It was also stated that the Defendant No.1 insisted that the plaintiffs to sign a typed and printed paper containing the personal guarantee by the plaintiffs. The plaintiffs on good faith signed the printed document of the Defendant No.1 which contained personal guarantee of the plaintiffs in respect of the loans so sanctioned in favour of the Defendant No.2 on 25.04.2007. It was further stated that the Plaintiff No.2 retired on 11.04.2007 and thereafter, the Plaintiff No.1 retired on 28.06.2016 and accordingly, their names were deleted from the records of the Registrar of Companies and at the time of filing of the suit, the Defendant No.2 had been doing business with the

Directors Shri Debishankar Kar and Smti Mary Das. It was further mentioned that the Defendant No.2 till the date of retirement of the plaintiffs owned an amount of Rs.3 crores and the plaintiffs were to receive the said amount from the Defendant No.2.

6. Be that as it may, although the plaintiffs had retired from the Directorship, the property described in Schedule-B land was not freed from the collateral security created in favour of the Defendant No.1 and as such the said property was charged by the Defendant No.1 as a collateral security for sanctioning the term loan in favour of the Defendant No.2. It was further mentioned that the plaintiffs on their retirement from the Defendant No.2 demanded Rs.3 crores being the value of the plots of land as mentioned in Schedule-B but the defendant No.2 avoided the request on one plea or the another and ultimately on delivery of the judgment dated 28.06.2017 passed in OA No.63/2012 by the learned DRT, Guwahati, the Defendant No.2 on 11.04.2018 refused to pay the same which compelled the plaintiffs to bring the suit.

7. It was further mentioned in the plaint that the Defendant No.1 had initiated a proceedings before the learned Debt Recovery Tribunal, Guwahati which was registered and numbered as OA No.63/2012 for realization of the money from the Defendant No.2 in respect of the loan so sanctioned by the Defendant No.1 along with accrued interest thereon due to non-performance of the Escrow account by the Defendant No.2. In the said proceedings, the Plaintiffs, Defendant No.2 and the proforma Defendant No.3 were arrayed as defendants. The said proceedings was duly contested by them and finally on 28.06.2017, the learned DRT allowed and decreed the claim of the Defendant No.1 by holding that the plaintiffs and others to be liable for the

payment of the debt to the Defendant No.1. The said judgment passed by the learned DRT has been enclosed as Plaintiff's Document No.1 and as such taking into account that it was enclosed as Plaintiff's Document No.1, this Court duly perused the said judgment.

8. From a perusal of the said judgment enclosed as Plaintiff's Document No.1, it transpires that in the proceedings before the DRT, Guwahati, the plaintiffs of the present suit along with the Defendant no.2 jointly filed a written statement and the proforma defendant No.3 filed a separate written statement. In the said joint written statement, it was contended that the Plaintiff No.2 was no longer one of the Directors of the Defendant No.2 of the suit as the Plaintiff No.2 had resigned from the said Directorship w.e.f. 11.04.2007 and thereafter the plaintiffs had dissolved their marriage by mutual consent. It was further mentioned that the Board of Directors of the Defendant No.2 of the present suit vide resolution dated 02.05.2012 had authorized the Plaintiff No.1 to take necessary steps for and on behalf of the Defendant No.2 of the present suit. The plaintiffs as well as the Defendant No.2 again took another joint plea that the personal guarantee agreement dated 26.04.2007 executed by the plaintiffs in favour of the Defendant No.1 of the suit as security against the loan sanctioned is void agreement and without authority of law as it is a settled law that the rights and liability of the surety and the principal borrower are different and distinct. It is further relevant to mention that the Plaintiff No.1 herein adduced evidence on behalf of the Defendant No.2 of the instant suit in the said proceedings before the learned Debt Recovery Tribunal.

9. The learned Debt Recovery Tribunal after taking into consideration the

various materials on record passed the judgment dated 28.06.2017 thereby directing issuance of a Recovery Certificate in favour of the Defendant No.1 (the Petitioner herein) for an amount of Rs.2,67,19,810/- against the Defendant Nos. 1, 2 and 3 jointly and severally (the plaintiff No.1 and 2 along with the Defendant No.2) with pendente lite and future interest @13.50% per annum with quarterly rest till realization of the amounts in full along with cost of the application. The proforma Defendant No.3 was not fastened with any liability of the Defendant No.2 of the present suit.

10. Pursuant thereto, on 30.06.2017, a Recovery Certificate was issued and thereupon, the recovery proceedings was also initiated. At the time when the recovery proceedings were initiated, the present suit was filed in the year 2018 seeking various reliefs to the effect that the Plaintiff Nos.1 and 2 cannot be fastened with the liability on the basis of their personal guarantee dated 26.04.2007. In addition to that, it was also prayed that the Defendant No.2 is liable to pay to the plaintiffs an amount of Rs.3 crores being the value of the plots of land as described in Schedule-B to the plaint. In addition to that, a permanent injunction has been sought for against the Defendant No.1 (the petitioner herein) for restraining it from execution/realization of money by the Recovery Certificate dated 28.06.2017 in OA No.63/2012 against the plaintiffs.

11. Pursuant to the filing of the suit, the Defendant No.1 who is the Petitioner herein filed an application under Order VII Rule 11(d) of the Code for rejection of the plaint in view of the ground that from a perusal of the statements made in the plaint, the suit was barred under Section 18 of the Recovery of Debt and Bankruptcy Act, 1993. The said application was rejected vide the impugned order dated 11.11.2021 and as such the present

application has been filed.

12. I have heard Mr. K. Bhattacharjee, the learned counsel appearing on behalf of the Petitioner and Mr. J. Sharma, the learned counsel appearing on behalf of the Respondents and have given due consideration to their respective submissions.

13. From a perusal of the plaint, prima facie it appears that the plaintiffs in the present suit have on one hand are re-agitating the issue which was raised before the learned Debt Recovery Tribunal, Guwahati and the same was rejected by the judgment and order passed on 28.06.2017 in OA No.63/2012 by issuing the Recovery Certificate. The said issue by now had attained finality pursuant to the judgment passed by the learned Debt Recovery Tribunal dated 28.06.2017.

14. Be that as it may, on the other hand in the plaint, the plaintiffs have claimed against the Defendant No.2 in view of the recovery proceedings which were initiated by the Bank pursuant to the judgment dated 28.06.2017 in OA No.63/2012 and the subsequent issuance of the Recovery Certificate and non-receipt of Rs.3 crores of their entitlement from the Defendant No.2. The issue as to whether the plaintiffs would be entitled to any claim against the Defendant No.2 is not an issue decided by the learned Debt Recovery Tribunal in its judgment dated 28.06.2017. In addition to that, the bar contained under Section 18 of the Recovery of Debt and Bankruptcy Act, 1993 would not be applicable insofar as the claim made against the Defendant No.2.

15. At this stage, this Court finds it relevant to take note of the judgment of the Supreme Court in the case of ***Madhav Prasad Aggarwal and Another***

Vs. Axis Bank Ltd. and Another reported in (2019) 7 SCC 158 wherein the Supreme Court categorically observed that the plaint as presented must proceed as a whole or can be rejected as a whole but not in part or for that matter, the provisions of Order VII Rule 11 of the Code can only be exercised to reject the plaint as a whole and there cannot be part rejection of the plaint. Taking into account that the plaintiffs have disclosed a cause of action against the Defendant No.2 in respect to a claim pertaining to the Schedule-B property, this Court is of the opinion that the learned Trial Court was justified in rejecting the application under Order VII Rule 11(d) of the Code so filed by the impugned order dated 11.11.2021.

16. Under such circumstances, this Court finds no merit in the instant petition for which the instant proceedings stands dismissed. This Court however observes that it shall not be a bar upon the Petitioner herein to file appropriate application for striking out the pleadings if the Petitioner is advised to take such recourse.

17. The interim order passed on 07.02.2022 whereby the further proceedings of Title Suit Case No. 306/2018 was stayed, is hereby vacated.

18. Taking into account that both the parties are duly represented, they are directed to appear before the learned Trial Court on 15.07.2024 for further proceedings of the suit.

JUDGE

Comparing Assistant