

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

RP.No. 856 of 2015 () IN WP(C).29304/2013

AGAINST THE JUDGMENT IN WP(C) 29304/2013 of HIGH COURT OF KERALA
DATED 31-08-2015.

REVIEW PETITIONERS/PETITIONERS IN THE WRIT PETITION:

1. K.S.SIVAPRASAD, AGED 52 YEARS,
S/O. SANKARANARAYANA PILLAI,
SENIOR TELEPHONE OPERATIVE ASSISTANT,
OFFICE OF THE GENERAL MANAGER, TELECOM,
BHARATH SANCHAR NIGAM LTD. (B.S.N.L), THIRUVALLA,
PATHANAMTHITTA DISTRICT. RESIDING AT PRASANTH BHAVAN,
AZHYDATHUCHIRA P.O., THIRUVALLA, PATHANAMTHITTA.
2. ANNAMMA BABY, AGED 45 YARS, W/O. BABY, TELEPHONE OPERATIVE
ASSISTANT, H.R.D. SECTION, OFFICE OF THE GENERAL MANAGER,
TELECOM, BHARATH SANCHAR NIGAM LTD. (B.S.N.L.), THIRUVALLA,
PATHANAMTHITTA DISTRICT.

BY ADVS.SRI.S.SUBHASH CHAND
SRI.S.JAYAKRISHNAN
SRI.S.PARAMESWARA PRASAD

RESPONDENTS:

1. THE ASSISTANT REGISTRAR, OFFICE OF THE ASSISTANT REGISTRAR
OF CO-OPERATIVE SOCIETIES, POSTAL TELECOM, BHARATH SANCHAR
NIGAM LTD. (B.S.N.L) EMPLOYEES' CO-OPERATIVE BANK LTD. NO.1940,
THIRUVANANTHAPURAM - 695 001.
2. THE ACCOUNTS OFFICER, OFFICE OF THE GENERAL MANAGER,
TELECOM, BHARATH SANCHAR NIGAM LTD. (B.S.N.L), THIRUVALLA,
PATHANAMTHITTA DISTRICT - 689 101.
3. SECRETARY, POSTAL TELECOM, BHARATH SANCHAR NIGAM LTD.
(B.S.N.L) EMPLOYEES' CO-OPERATIVE BANK LTD. NO.1940,
THIRUVANANTHAPURAM - 695 001.
4. MURALEEDHARAN NAIR E.V. (AGE AND FATHER'S NAME NOT KNOWN
TO THE PETITIONER), FORMER TELEPHONE MECHANIC, TELEPHONE
EXCHANGE, SEETHATHODU, NOW RESIDING AT EDANATTU
PADINJATTETHIL, VAZHAMUTTAM, OMALLOOR,
PATHANAMTHITTA DISTRICT - 689 647.

R BY SMT.I.SHEELA DEVI

THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON
14-10-2015, ALONG WITH RP. 857/2015, THE COURT ON THE SAME
DAY PASSED THE FOLLOWING:

DAMA SESHADRI NAIDU, J.

R.P. Nos. 856 & 857 of 2015

Dated this the 14th day of October, 2015.

ORDER

Background:

In R.P. No. 856 of 2015, the petitioners are the guarantors, and the 4th respondent is the principal borrower; whereas the 3rd respondent is the creditor Bank.

2. In R. P. No. 857 of 2015, the petitioner is the guarantor, and the respondents 4 and 5 are the principal borrowers; whereas the first respondent is the creditor Bank. In both the cases, the principal borrowers, having been subjected to disciplinary proceedings, were made to retire compulsorily.

3. Since both the review petitions raise the same questions of law and fact, this Court has decided to dispose of them together through a common order. For ease of reference and convenience, I take into consideration the facts in R.P. No. 856 of 2015.

Facts:

4. Briefly stated, the petitioners are guarantors for the loan obtained by the 4th respondent from the first respondent Bank.

When, on the default committed by the 4th respondent, the first respondent Bank initiated recovery proceedings—according to the petitioners—exclusively against the guarantors, both of them approached this Court and filed W.P.(C) No. 29304 of 2013.

5. To put the issue in context, I may observe that, after obtaining the loan, the 4th respondent faced disciplinary proceedings and earned a compulsory retirement. Out of service, the 4th respondent was not getting the regular salary, except having DCRG (Death-cum-Retirement Gratuity) to his credit. It is the contention of the petitioners that the creditor Bank could as well recover substantial amounts from the defaulter's DCRG.

6. In the course of time, this Court disposed of the writ petition through a judgment dated 31.08.2015, inter alia, holding that in terms of Section 128 of the Contract Act, it is the prerogative of the creditor to have the recovery either from the principal borrower or from the guarantors, or in the alternative, from all of them together.

7. This Court, in essence, has held that the liability being joint and several, the guarantors cannot be heard complaining that they

cannot be singled out or discriminated against. Now the petitioners have come up with the review petition.

8. The singular grievance of the petitioners is that this Court, while rendering the judgment dated 31.08.2015, did not take into account the impact of Section 37 of the Kerala Co-operative Societies Act ('the Societies Act' for brevity) on the principle of joint and several liability as has been incorporated under Section 128 of the Contract Act.

Submissions:

The Review Petitioners':

9. Sri. S. Subhash Chand, the learned counsel for the petitioners, has strenuously contended that Section 128 of the Contract Act is to be read in conjunction with Section 37 of the Act. According to him, since the Co-operative Societies Act has received the Presidential assent, even if there were to be any repugnancy, the provisions of the said Act prevail over the Indian Contract Act, a central enactment though.

10. In further elaboration of his submissions, the learned counsel has drawn my attention to a specific statutory stipulation in Section

128 of Contract Act to the effect that the liability of a surety is co-extensive with that of the principal debtor unless the contract otherwise provides. The learned counsel has laid much emphasis on the expression in the nature of a conditional clause: 'unless it is otherwise provided by the contract'.

11. The learned counsel has also taken me through Section 37 of the Act to contend that once the employee volunteers and executes an agreement with the creditor-society authorising the employer to effect deductions from his salary, it is mandatory that the recovery should be against the said person also, simultaneously. In other words, whatever be the protective cover the said employee has under any provision of law, it stands removed in the light of the agreement he has voluntarily entered into under Section 37 of the Act.

12. The learned counsel has, in the same vein, submitted that in Ext.P4 demand notice, the very third respondent Bank required the employer to recover the dues from the 4th respondent's assets: the DCRG benefit. In support of his submissions that recoveries can be effected even from DCRG, the learned counsel for the petitioners has

placed reliance on **Surendran v. Mavelikkara Primary Coop. Agrl. and R.D. Bank Ltd.**¹. On the issue that the creditor should take steps against not only the guarantors but also the principal borrower, the learned counsel has placed reliance on **Rehima Beevi v. D. Rajan and others**².

Respondents':

13. The learned counsel for the third respondent has submitted that the judgment dated 31.08.2015 does not suffer from any error apparent on the face of the record. According to him, there are no clerical errors to be corrected either. The learned counsel has contended that, in terms of Order 47 of CPC or even in terms of the well-settled principles of common law regarding the review, the petitioners could not establish before this Court any ground entailing a review of the judgments.

14. The learned counsel has also submitted that if at all there is any error in the merits of the matter, it is open for the petitioners to challenge the judgment in an intra-court appeal, if they choose to.

1 2005 KHC 1796

2 2011(3) KHC 373

Issue:

15. Indeed, the singular issue to be determined in these review petitions is the impact of Section 37 of the Kerala Co-operative Societies Act on Section 128 of the Contract Act.

16. The learned counsel for the third respondent Bank has singularly contended that no grounds have been established for reviewing the judgment. As can be seen, all the contentions raised by the petitioners are centered around the impact of Section 37 of the Act on the principle of 'joint and several liability'.

17. Be that as it may, instead of letting the issue simmer in the cauldron of litigation, we had better quench it—by addressing it on merits. Even otherwise, this Court at the time of rendering the judgment in question, indeed, has not considered the impact of Section 37 of the Act on, or its interplay with, Section 128 of the Contract Act. It being a pure question of law, let the judgment not bear the cross of per incuriam on the ground of non-consideration of a relevant, if it were, provision of law.

18. The fulcrum of the submission of the learned counsel for the

petitioners is that Section 123 of the Contract Act has been qualified to the effect that the joint and several liability is only in the absence of any contrary provision under any contract. According to him, Section 37 of the Act counterbalances or even nullifies the rigour of Section 128 of the Contract Act. In that context, it is profitable to examine both the provisions: Section 128 of the Contract Act and section 37 of the Societies Act, which read as follows:

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.

(emphasis supplied)

Section 37 of the Societies Act:

37. Deduction from salary to meet society's claim in certain cases.— (1) Notwithstanding anything contained in any law for the time being in force, a member of a society may execute an agreement in favour of the society providing that his employer or the officer disbursing his salary or wages shall be competent to deduct from the salary or wages payable to him by the employer, such amount as may be specified in the agreement and to pay the amount so deducted to the society in satisfaction of any debt or other demand owing by the member to the Society.

(2) On the execution of such an agreement, the employer or the officer disbursing the salary or wages of any such member as is referred to in sub-section (1) shall, if so required by the society by requisition in writing and so long as such debt or demand or any part of it remains unpaid, make the deduction in accordance with the agreement and pay the amounts so deducted to the society within seven days from the date of the deduction.

Provided that this sub-section shall not apply if the employees, whose salary is to be deducted, are not informed at least thirty days in advance, by notice duly acknowledged, about the dues on the loan or award amount.

(emphasis supplied)

19. From the above-extracted provisions, it is evident that the co-extensive liability of a surety can be waived by way of a contract to the contrary. To that extent, there can be no quarrel. On the other hand, Section 37 of the Societies Act begins with a non obstante clause. Further, a member of a society/bank is at liberty—for the expression employed is ‘may’—to execute an agreement in favour of the society agreeing that his employer or the officer disbursing his salary is competent to deduct from the salary payable to him. The amount to be deducted, too, can be specified, and it will be in satisfaction of any debt or other demand owed by the member to the Society.

20. If we closely examine the provision, two things emerge: that the member of a Society has the option or choice of authorising beforehand his employer to deduct from his salary any amount on the demand of the Society to which the employee is indebted; once the

employee exercises this option, the employer has no choice other than complying with the demand of the Society.

21. As can be gathered from the proviso, the only safeguard is that the deductions cannot be effected unless the employee is informed at least thirty days in advance by notice about the dues on the loan or award amount, as the case may be.

22. Indeed, without much cavil, it can be stated that it is an enabling provision. And it is meant for the benefit of the Creditor-Society. In a bilateral transaction of a loan between the Society and the member, the member's employer evidently is no privy. Ipso facto, once the employer has no privity with either the Society or the employee concerning the contract, be it of borrowing, the outcome of the contract can hardly bind the employer.

23. Default having been committed by a member, the Creditor-Society can exercise its option of recovery from the member's salary, if he is an employee. For this, it has first to obtain a decree or an award, as the case may be, and thereafter take garnishee proceedings against the employer.

24. Black's Law Dictionary (9th Ed.) describes garnishment as a judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property (such as wages or bank accounts) held by that third party. It is an anomaly, a statutory invention sui generis, with no affinity to any action known to the common law.

25. The whole purpose of Section 37 of the Act, to my mind, is to enable the Society to obviate the rigmarole of the recovery proceedings and also the garnishee mechanism.

26. The fact, nevertheless, remains that Section 37 of the Act does not dilute the privileges or the power of the Creditor-Bank to have the recovery at its option either from the principal borrower or the guarantor. An enabling provision cannot be elevated and placed on the pedestal of being mandatory, thereby defeating the very rights of a person, for whose benefit the provision, in the first place, has been brought into effect.

27. In the light of the above discussion, I fail to persuade myself

to accept the contention of the learned counsel for the petitioners that Section 37 of the Act imposes an embargo on the powers of the creditor to take recourse to Section 128 of the Contract Act.

28. Indeed, it is not in dispute that the third respondent Bank issued Ext.P4 demand notice seeking recovery from the DCRG of the 4th respondent pending with the employer; in the meanwhile, however, the third respondent Bank is said to have been content with the deductions made from the salaries of the guarantors.

29. In the first place, it cannot be said that the employer has totally rejected Ext.P4, nor has the Society/Bank abandoned its claim made through it. Ext.P4 may still have been under process. If the creditor Bank desires to have a faster realisation, it could as well press for recovery on the strength of Ext.P4, as well.

30. On the converse, assuming that the Bank has continued with the recoveries from the guarantors, without its ever bothering to touch the principal borrower, it is for the guarantors, having repaid the loan, to take recourse to the remedy of subrogation or restitution in terms of equitable remedies incorporated in the provisions such as Sections 140

and 141 of the Indian Contract Act. Thus, the petitioners are not remediless vis-à-vis the amounts being recovered from them.

31. The Hon'ble Supreme Court in **Amrit Lal Goverdhan Lalan v. State Bank of Travancore**³ has quoted with approval a decision of the Court of Chancery in **Cravthorne v. Swinburne**⁴, to the effect:

"The surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor. This right of a surety also stands, not upon contract, but upon a principle of natural justice."

32. Their Lordships have further observed that the language of the section which employs the words "is invested with all the rights which the creditor had against the principal debtor" makes it plain that even without the necessity of a transfer, the law vests those rights in the surety in terms of Section 141 of the Indian Contract Act.

33. Indeed, this Court in **Rehima Beevi** (supra) has observed that appropriate steps should be taken to recover from the salary of the principal borrower as well. The learned Division Bench, to my

³ AIR 1968 SC 1432

⁴ (1807) 14 Ves 160

mind, has not laid down an invariable proposition of law that under all circumstances, there shall be, as a pre-condition, recovery from the principal borrower before any recovery could be effected from the guarantors. It is, indeed, well established that though it is equitable to ensure recovery from the principal borrower as well, in the face of a statutory mandate otherwise, equity gives way to the statutory mandate, as is well known. The proposition of law in **Surendran** (supra) that DCRG is liable for deduction in terms of Section 37 of the Societies Act hardly has any relevance here.

34. It is, however, made clear that the direction of this Court in the judgment dated 31.08.2015 in W.P.(C) Nos. 29304 of 2013 and 6358 of 2015 that the authorities shall consider the petitioners' representation still remains undisturbed.

In the facts and circumstances, the review petitions are dismissed. No order as to costs.

DAMA SESHADRI NAIDU, JUDGE.

