HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No. 1950 of 2015

ORDER: (*Per Hon'ble Sri Justice A. Shankar Narayana*)

Being aggrieved by the order dated 19.01.2015 in E.P. No.66 of 2014 in Arbitration Case No.571 of 2013 on the file of the Senior Civil Judge, Chirala, Prakasam District (for short, 'executing Court'), whereby and whereunder, the execution petition filed by the revision petitioner (decree holder) was dismissed on the objections raised by respondent Nos.1 to 4 herein (judgment debtors), the decree holder preferred the instant Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (for short, 'CPC').

2. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the execution petition.

3. The decree holder was the claimant before the arbitral tribunal located at Nellore. By the order dated 17.07.2013, the arbitrator passed an award in Arbitration Case No.571 of 2013 requiring the judgment debtors to pay the claim amount of Rs.4,65,317/- with interest at 18% per annum from the date of claim petition, i.e., on 06.05.2013, till realization with costs. Since the claim awarded by the arbitral tribunal was not satisfied by the judgment debtors, the decree holder filed the aforesaid execution petition before the executing Court under Order - XXI Rule - 48 of CPC seeking attachment of salaries of judgment debtor Nos.1 to 4 as per Section 60 of CPC. During enquiry, one G.V.S.K. Phani Kumar, employee of the decree holder, as general power of attorney holder, filed affidavit under Section 139 of CPC stating therein that judgment debtor No.3 is an employee, drawing Rs.26,000/- per month as salary. Judgment debtor No.3 resisted it questioning the maintainability of the execution petition on the ground that the arbitral award is neither a decree nor an order for payment as it was not rendered in the suit, placing reliance on the decision of the Hon'ble Supreme Court in **Paramjeet Singh Patheja v. ICDS Ltd.**[1] Second objection raised by him was that the decree holder, in collusion with the principal judgment debtor, proceeded against him, though, he is judgment debtor No.3 but not the principal judgment debtor and placed reliance on a decision of this Court in **Jaichand T. Gangwal v. Sriram Chits Private Limited and others**[2]**.** Also pleading that he has undergone major operation and suffering from leg pain and spending Rs.15,000/- per month towards medical treatment and maintaining the family with meagre salary, sought to dismiss the petition.

4. The executing Court observing that the decree holder has not offered any explanation as to why he has chosen judgment debtor No.3 alone leaving the principal judgment debtor and other guarantors and distinguishing the decision relied on by the learned counsel for the decree holder in **Sri Ch. Venkateswara Rao and others v. Margadarshi Chit Funds Limited and another, Vizianagaram**[3] that it was rendered in the context of execution petition filed against the principal judgment debtor and the guarantors, and, therefore, would not assist the decree holder and relying on the decision of this Court in

Jaichand T. Gangwal's case (Supra 2), wherein it was held that the proceedings against one of the guarantors, keeping aside the principal debtor and the other sureties, would certainly, give scope for the collusion between the decree holder on the one hand and some of the judgment debtors on the other, held that an inference can be drawn that there is collusion between the decree holder and other judgment debtors in the instant execution petition and thereby refused to issue the warrant of attachment of salary. Somehow, the executing Court observing that Section 38 of CPC mandates that the decree may be executed by either the Court which passed the decree or by the Court to which it was sent for execution and since the award was neither passed by the executing Court nor it was sent to that Court for execution, held that the award cannot be enforced, and thereby, dismissed the execution petition.

5. It is the aforesaid order which is under challenge in the instant civil revision petition contending in the grounds that the executing Court deviated from the well settled legal principle that the decree holder is left with the option to proceed against the principal borrower or surety/guarantor or both, simultaneously, in accordance with law. It is stated that the executing Court somehow, overlooked the provisions of Rule - 30 of Order - XXI CPC in appreciating the facts in the *lis*. It is further stated that the executing Court ought to have followed the well settled legal principle laid down in

Kotak Mahindra Bank Ltd., v. Sivakama Sundari, S. Narayana, B. Murthy[4] rendered by the Madras High Court and, therefore, sought to set aside the order under challenge.

6. Heard Sri Maheswara Rao Kuncheam, learned counsel for the revision petitioner (decree holder). During pendency of the proceedings, since respondent No.4 (judgment debtor No.4) died, respondent Nos.5 and 6 were brought on record as legal representatives of respondent No.4 by the order dated 31.08.2014 in C.R.P.M.P. No.1950 of 2015. None appears for respondent Nos.1 to 3, 5 and 6, despite service of notices.

7. Learned counsel for the decree holder would submit that the executing Court has not properly appreciated the well settled propositions of law that the award passed by the arbitral tribunal is an executable decree for all purposes and maintainable and it is for the decree holder to choose to proceed as against the principal debtor or a surety/guarantor or against both, simultaneously, for realization of the decretal amount. To substantiate his submissions, he has placed reliance on the decisions of Hon'ble Supreme Court in **The Bank of Bihar Ltd., v. Dr. Damodar Prasad and another**[5], **Industrial Investment Bank of India Limited v. Biswanath Jhunjhunwala**[6], and the decision rendered by the Madras High Court in **Kotak Mahindra Bank's** case (Supra 4).

8. The Hon'ble Supreme Court in the case of **Dr. Damodar Prasad's Case** (Supra 5), while observing that the liability of the surety is co-extensive with that of the principal debtor under
Section 128 of the Indian Contract Act, 1872, and, thus, surety's liability was 'immediate' and is not deferred until the creditor exhausted his remedies against the principal debtor, held in paragraph Nos. '4' and '5' thus:

> "4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson, (1802) 6 Ves June 714 at p. 734 = 31 ER 1272 at p. 1282: "In the absence of some special enquiry the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.
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> 5. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In Lachhman Joharimal v. Bapu Khandu, (1869) 6 Bom HCR 241, the judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties, presented applications for the imprisonment of the sureties before levying execution against the principals. The judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C. J. and Melvill, J. agreed with this opinion and observed:-
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> "The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

9. In the case of **Biswanath Jhunjhunwala** (Supra 6), the Hon'ble Supreme Court reiterated the principle in **Dr. Damodar Prasad's** case (Supra 5), holding that both the principal debtor and surety are liable at the same time to the creditor and that the liability of guarantor and principal debtor is co-extensive but not alternative.

10. In the context of equating the award passed by the arbitral tribunal to that of a decree of a civil Court, in **Kotak Mahindra Bank's Case** (Supra 4), a single Judge of High Court of Madras held that the provisions of the Arbitration and Conciliation Act, 1996 (for short, 'Act, 1996) provides that an award passed by the arbitral tribunal was liable to be enforced under Section 36 of Act, 1996 in the same manner as if it is a decree of a civil Court in terms of the provisions of the CPC, and thus, the Act, 1996 elevates an award to the level of decree, for the purpose of execution, but it does not elevate the arbitral tribunal to the status of a civil Court. It is needless to mention that the decree holder cannot file an application for execution before the arbitral tribunal which passed the award and even the arbitral tribunal cannot also order for transmission of the award to any other Court for its execution, since the provisions of Order - XXI Rules - 5, 6 and 10 of CPC cannot be applied to an arbitral tribunal.

11. Thus, when the Act, 1996 is silent as to passing of a decree in terms of the award except in terms of Section 34 of the Act, 1996 and in the absence of any provisions in the Act, 1996 making the arbitral tribunal, a Court which passed the decree and also in the absence of any provisions making the Court within whose jurisdiction an award was passed as the Court which passed the decree, it is not open for any executing Court either to demand transmission of a decree from any other Court or to order transmission to any other Court.

12. Therefore, we are of the view, that the executing Court went wrong in recording a finding that the decree holder, since did not come up with any explanation as to why he has chosen judgment debtor No.3 alone, leaving the principal borrower and other guarantors and drawing an inference that there is collusion between the decree holder and other judgment

debtors, without there being any material to give rise to such a probability to infer collusion. We are of the considered view, that further finding recorded by the executing Court that execution petition filed by the decree holder falls outside the purview of Section 38 of CPC, and, therefore, is not maintainable, suffers from legal infirmity warranting interference. We, therefore, do not have any hesitation to set aside the order under challenge.

13. Accordingly, the instant Civil Revision Petition is allowed setting aside the order dated 19.01.2015 passed by the executing Court in E.P. No.66 of 2014 in Arbitration Case No.571 of 2013, directing the executing Court to issue warrant of attachment of salary of the respondent - judgment debtor No.3 in accordance with the provisions of Clause (i) of sub-section (1) of Section 60 of CPC.

No order as to costs.

14. As a sequel thereto, miscellaneous petitions, if any pending in the instant civil revision petition, shall stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

September 14th, 2015.

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[1] AIR 2007 SC 168

[2] 2013 (6) ALT 798

[3] 2003(3) L.S. 48

[4] 2011 Law Suit (Mad) 2927

[5] AIR 1969 SC 297

[6] (2009) 9 SCC 478