

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 324 of 2015**

(Arising out of judgment/order dated 25.07.2015 in Civil Suit No.8-B/2011 passed by the 6th Additional District Judge, Durg)

- State Bank Of India (Incorporated Under The State Bank Of India Act, 1955) Having Its Central Office: Backbay Reclamation, Madam Cama Road, Bombay, Having Its Legal Office: Hoshangabad Road, Bhopal And For Recovery Proceedings Situated At Stressed Assets Resolution Center (SARC), Sector-1, Bhilai, Through Its Present Officer Shri Kishore Kumar Mall S/o Late Shankarlal Mall, Aged About 57 Years, S.A.R.C. Bhilai, Tahsil And District Durg, Chhattisgarh(Plaintiff)

---- Petitioner

Versus

1. Prahlad Ram S/o Late Shri Dhanvar, Aged About 52 Years, R/o Village Somni, Indirapara, Bhilai-3, Tahsil Patan, District Durg, Chhattisgarh
2. Prakash Samatkar S/o Late Bhola Ganpat Samatkar, R/o Block 13-C, Ruabandha Sector, Bhilai, Tahsil And District Durg, Chhattisgarh(Defendants)

---- Respondent

For Appellant
For Respondent No.1

Shri P. R. Patankar, Advocate
Shri Rahul Tamaskar, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Arvind Singh Chandel****Order On Board by Prashant Kumar Mishra J.****27/09/2017**

1. Although the present appeal preferred by the State Bank of India is barred by two days of limitation, however, this Court has issued notice to the respondents on prayer for

condonation of delay as also on the memo of appeal and a short question would arise in this appeal for consideration, therefore, we deem it expedient to dispose it of at the motion stage itself. The delay of two days in filing the appeal, having been explained properly, the same deserves to be and is hereby condoned.

2. The issue fallen for consideration is whether the trial Court has committed an error of law by not fastening the liability for repayment of the loan amount on the guarantor, the respondent No.2 herein, in view of the express statutory prescription contained in Section 128 of the Indian Contract Act, 1872 (henceforth 'the Contract Act') and that too without observing in the decree that the suit is dismissed as against the guarantor, the respondent No.2.
3. The borrower/respondent No.1 having not appealed against the impugned decree, the facts stated by the learned trial Judge in the impugned judgment are not disputed, we shall, therefore, advert to the bare minimum facts, as the appeal is required to be decided on the point of law. Suffice it would be to mention that the respondent No.1 (henceforth 'the borrower') obtained term loan to the tune of Rs. 7.45 Lakhs on 03.05.2006 for construction of house on his land situated at Shikshak Nagar, Farid Nagar, Ward No.8, Tehsil and District Durg. The respondent No.2 (henceforth 'the guarantor') stood guarantor to the said loan transaction promising that in the

event of default committed by the borrower in repayment of the loan amount, he shall be liable to satisfy the repayment. The borrower executed equitable mortgage of the said land, over which the house was to be built. When the borrower made default in repayment of loan, the Bank initially proceeded under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth 'the Act, 2002) and recovered Rs.3,60,000/- by effecting sale of the mortgaged property. However, the borrower still owed Rs. 7,81,759/- to the Bank, therefore, the present suit was filed for recovery of the said amount. The suit was initially dismissed on 07.08.2012, against which the Bank preferred FA No.24/2013 before this Court, which was allowed on 24.06.2014 and the matter was remitted back to the trial Court for decision afresh. The present impugned judgment and decree has been rendered after fresh adjudication on merits by the trial Court. In the impugned decree, the trial Court has absolved the guarantor from the liability to satisfy the outstanding against the borrower on the ground that the guarantor had not executed any revival letter or balance confirmation letter in favour of the Bank.

4. Assailing the impugned judgment and decree, Shri Patankar, learned counsel for the appellant would refer to the provisions contained in Section 128 of the Contract Act and the law laid down by Supreme Court in the matter of **Ram Kishun and**

others vs State of Uttar Pradesh and others¹ to put forth that the liability of the borrower and the guarantor being co-extensive, the trial Court should have passed a joint and several decree against the borrower as well as guarantor.

5. Shri Rahul Tamaskar, learned counsel for the borrower would submit that the borrower was *ex parte* before the trial Court and has not appealed against the impugned decree, therefore, the borrower would not take sides in this appeal. Shri Tamaskar would also submit that the land mortgaged by the borrower having already been sold in the proceedings under the Act 2002, he has repaid the amount to the best of his capacity.
6. A bare reading of the impugned judgment would explicit that while absolving the guarantor of his liability to satisfy the outstanding, the Court has not referred to any clause in the guarantee agreement, which restricts the guarantor's liability for a limited period or for a limited extent. As a matter of fact, the guarantor having not entered appearance before the trial Court, no such defence was ever raised before the trial Court. More surprisingly, the trial Court seems to have framed issue Nos.7 and 8 as to whether the guarantor's liability has ceased to operate and whether the borrower has obtained guarantor's signature by committing fraud and has recorded its finding against the guarantor, yet while discussing the liability of guarantor in para 22 of the judgment, it has recorded a

¹ (2012) 11 SCC 511

contrary finding that the guarantor is not liable to satisfy the loan amount, because the revival letter has not been signed by the guarantor, which was necessary in view of Section 135 of the Contract Act.

7. To understand and appreciate the point of law involved in the case at hand, we shall refer to the provisions contained in Section 128 and 135 of the Contract Act. They are reproduced herein under for ready reference:-

“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.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.”

“135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor. — A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.”

8. On a plain reading, It is clear that Section 128 prescribes that the liability of the surety is co-extensive with that of principal debtor unless it is otherwise provided by the contract and that a contract between the creditor and the principle debtor, by which the creditor makes a composition with, or promise to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

9. A joint reading of the provision would thus indicate that if the surety desires to limit its liability, the surety agreement has to specifically provide for it, likewise, if the surety desires to discharge the surety after certain time or on certain happenings between the creditor and the debtor, it may choose to mention in the agreement that the surety shall discharge when the eventuality, as mentioned in Section 135 of the Contract Act, happens between the creditor and the debtor.
10. In view of these twin provisions, we are required to advert to the contents of the guarantee agreement, a copy of which has been supplied to this Court by learned counsel for the appellant Bank. We have retained a copy of the guarantee agreement to make it part of record of this appeal. We have received the document because the same has already been exhibited before the trial Court as Exhibit-P-3. The relevant terms of the guarantee agreement are reproduced herein for ready reference:-

“That my/our liability under this guarantee is co-extensive with that of the Borrower as if I/we were the principal debtor(s) of the Bank and the amount due under this agreement will be recoverable from me/us without any recourse to the Borrower and it shall not be obligatory on the Bank to call upon the Borrower to pay the amount first or to take any action against the Borrower before enforcing the guarantee against me/us nor shall it be necessary for the bank to join the Borrower in any suit against me/us. I/we further agree that the guarantee given there under is irrevocable and enforceable notwithstanding any dispute or any suit that may be pending between the Bank and the borrower. That the guarantee shall be continuing one.

That the guarantor herein authorise the Borrower/s to acknowledge the debt, on his behalf also and any such acknowledgement or payment made by the Borrower/s in respect of the Loan, shall and shall always deem to extend the Limitation as against the guarantor.”

11. In the teeth of the above quoted terms of the guarantee agreement, we record our dismay as to how the trial Court has applied the provisions contained in Section 135 of the Contract Act when the guarantor has categorically agreed to make the guarantee irrevocable and continuing one, at the same time authorizing the borrower, to acknowledge the debt, on his behalf also (on guarantor's behalf) with further stipulation that any such acknowledgment or payment made by the borrower in respect of the loan, shall and shall also deem to extend the limitation as against the guarantor.
12. In view of the express terms of the guarantee agreement, authorities are not needed to support the findings recorded by us in the above paragraphs. However, we may cite some authorities only to sum-up that the liability of the surety has always been construed to be co-extensive with that of the borrower in view of Section 128 of the Contract Act as held in the matters of **The Bank of Bihar Ltd. Vs Dr. Damodar Prasad and another²**, **Maharashtra State Electricity Board, Bombay vs Official Liquidator, High Court, Ernakulam and another³**, **Union Bank of India vs Manku Narayana⁴** and

² AIR 1969 SC 279

³ (1982) 3 SCC 358

⁴ (1987) 2 SCC 335

State Bank of India vs M/s Indexport Registered and others⁵.

13. It is worth notice that the trial Court has recorded a finding in favour of the guarantor while absolving him of his liability to satisfy the debt, however, the operative part of the judgment as also the decree nowhere indicates that the suit has failed against the guarantor.
14. For the foregoing, the appeal preferred by the Bank deserves to be and is hereby allowed. The decree passed by the trial Court is modified to say that the decree is joint and several against the borrower and the guarantor as well and the Bank would be at liberty to recover the amount jointly and severally from both or from any one of them.
15. A decree be drawn accordingly.

Sd/-

Judge

Prashant Kumar Mishra

Sd/-

Judge

Arvind Singh Chandel

Akhilesh/Nirala

⁵ (1992) 3 SCC 159