THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.P.No.3926 of 2006

ORDER:

Heard Sri P.Srinivas, learned counsel for the petitioners and Sri K.Pavan Kumar, learned counsel for 1st respondent.

2. This Writ Petition is filed assailing the order dt.13-09-2005 in C.T.A.No.75 of 2003 of the A.P. Cooperative Tribunal, Warangal setting aside the order dt.05-11-2002 of the 2nd petitioner in Case No.39/B/02-03.

3. The 1st petitioner sanctioned loans to several borrowers for securing gas connections. The 1st respondent is a sub-franchisee and had arranged gas connections to the borrower and also stood as guarantor to the loans sanctioned by 1st petitioner. The 1st respondent has executed surety bond in favour of the 1st petitioner. On the basis of the surety bond given by 1st respondent as guarantor, gas connections were given to 260 borrowers. But they committed default in payment of loans borrowed by them from the 1st petitioner.

4. Alleging that 1st respondent collected the loan amount from the borrowers but did not remit the same to the 1st petitioner, a demand notice dt.05-01-2002 was issued by 1st petitioner to 1st respondent demanding payment of Rs.6,39,251/- within 15 days from the date of receipt of notice.

5. After receiving the said demand notice, 1st respondent failed to remit the amount to 1st petitioner. He also did not raise any objection to the said demand notice.

6. The 1st petitioner therefore filed application under Section 71 of the A.P. Cooperative Societies Act, 1964 (for short 'the Act') before 2nd petitioner for recovery of the loan amount granted in favour of 261 borrowers for whom the 1st respondent stood as guarantor. This was numbered as Case No.39/B/02-03 by 2nd petitioner.

7. The 2nd petitioner then issued a notice dt.22-10-2002 to 1st respondent asking 1st respondent to show cause why Certificate under Section 71 of the Act should not be issued for recovery of Rs.6,39,251/- with subsequent interest thereon, which represented the total amount due of loan sanctioned to 267 borrowers. He was asked to be present on 05-11-2002 to submit objections, if any, for issuance of Certificate under Section 71 of the Act. The 1st respondent failed to appear before 2nd petitioner on 05-11-2002. He also did not submit any objection with regard to issuance of Certificate under Section 71 against him. In view of the same, on 05-11-2002, the 2nd petitioner issued a Certificate under Section 71 of the Act for recovery of a sum of Rs.7,26,500/- with interest at 25% per annum from 01-11-2002.

8. The 1st respondent then assailed the same in C.T.A.No.543 of 2003 before the A.P. Cooperative Tribunal at Hyderabad. This was subsequently transferred to the A.P.

Cooperative Tribunal at Warangal and re-numbered as C.T.A.No.75 of 2003.

9. Before the 2nd respondent-Tribunal, a contention was raised by the 1st respondent that Section 71 would apply only for recovery of arrears of dues from members of society or financing bank or federal society, that 1st respondent was not a member who had taken a loan from the 1st petitioner bank, and therefore the 2nd petitioner could not have issued any Certificate under Section 71 of the Act on the application of 1st petitioner bank against 1st respondent who was not a member of the 1st petitioner bank for recovery of amounts. It was also contended that no attempt was made by 1st petitioner to recover the amount from the actual borrowers who are its members and principal debtors and 1st petitioner had also not impleaded any of the borrowers as parties to the proceedings before the 2nd petitioner.

10. Both these contentions found favour with 2nd respondent-Tribunal and it rejected the contentions of 1st petitioner that 1st respondent was jointly and severally responsible along with principal debtors and that according to the surety bonds he executed before 1st petitioner, the 1st respondent did not pay any money to 1st petitioner though he had collected some monies from the principal debtors. The 2nd respondent-Tribunal held that the language in Section 71 provides recovery of arrears due from only members of the society, financing bank or a federal society and since 1st respondent was not a member

who had taken loan from the 1st petitioner, he cannot be proceeded with under Section 71. It also opined that no steps were taken by 1st petitioner against the principal borrowers and it had also not impleaded them as parties before 2nd petitioner, and so, on the ground of non-joinder of necessary parties also, the Certificate granted under Section 71 by 2nd petitioner on 05-11-2002 is also not valid in law.

11. Assailing the same, the present Writ Petition is filed by the petitioners.

12. Sri P.Srinivas, learned counsel for the petitioners, contended that the interpretation of Section 71 of the Act by 2nd respondent-Tribunal is incorrect; Section 71 did not prohibit the 1st petitioner from obtaining a Certificate for recovery of amounts due from the members or from the guarantor; that the 1st petitioner need not implead the principal debtors in proceedings under Section 71 of the Act; and there is no requirement of law that a creditor should proceed against the principal debtor before proceeding against the guarantor.

13. He contended that the above interpretation was placed by a Division Bench of this Court in its order dt.27-07-1973 in W.A.No.516 of 1972, in relation to Section 61 of the Act, that it was followed by another Division Bench in **N.S.Sreenivasan Vs. Deputy Registrar of Co-operative Societies, Hyderabad and others**[1] and the said Ratio should be made applicable for interpretation of Section

[1] 1996 (3) ALD 654 (D.B.)

71 also. According to him, a surety, by offering himself as such, becomes attached to the loan transaction, and hence he comes under the liability which is the same as that of the principal debtor, and he is liable to be proceeded against in a dispute in proceedings not only under Sections 61 and 62 but also Section 71.

14. According to him, having regard to Section 128 of the Indian Contract Act, 1872, which provides that the liability of surety is coextensive with that of the principal debtor unless it is otherwise provided in the contract, the liability created against the surety is absolute and applies to all transactions wherever a person binds himself as a surety for a loan advanced; and wherever statutory provision is made for realization of debts from a loanee, which loans are also covered by surety arrangement, the procedure contemplated under the statute to proceed against the principal debtor would *ipso facto* bring within its fold, the right to proceed against the surety also.

15. Per contra, Sri K.Pavan Kumar, learned counsel for 1st respondent, supported the order passed by 2nd respondent-Tribunal. He contended that a reading of Section 71 shows that it enables only a creditor society to obtain Certificate under Section 71 against a member of the society and excludes a surety who is not a member. According to him, the procedure under Section 71 cannot be invoked against a surety who is not a member of the 1st petitioner bank; that the Court is precluded from adding any words in the statute or read words into it by treating the word “member” used in Section 71 as

also covering in surety who is not a member. He relied upon the judgments of the Supreme Court in **Dadi Jagannadham Vs. Jammulu Ramulu and others**[2] and **Satheedevi Vs. Prasanna and Another**[3].

16. I have noted the submissions of both sides.

17. Section 71 of the Act states:

"Section 71 : Recovery of debts:

(1) Notwithstanding anything in tills Act or in any other law for the time being in force and without prejudice to any other mode of recovery which is being taken or may be taken the Registrar may, on the application made by a 2[society] for the recovery of arrears of any sum advanced by it to any of its members 3[xxxx] and on its furnishing a statement of accounts in respect of the arrears and after making such inquiry as he deems fit, issue a certificate for the recovery of the amount stated therein to be due as arrears.

(2) Where the Registrar is satisfied, that a 2[society] has failed to take action under sub-section (1) in respect of any amount due as arrears, he may, on his own motion, and after making such enquiry as he deems fit, issue a certificate for the recovery of the amount stated therein to be due as arrears and such a certificate shall be deemed to have been issued on an application made by the society concerned.

(3) A certificate issued by the Registrar under sub-section (1) or sub-section (2) shall be final and conclusive proof of the arrears stated to be due therein and the certificate shall be executed in the manner specified in sub-section (2) of Section 70."

[2] (2001) 7 S.C.C. 71
[3] (2010) 5 S.C.C. 622

18. A plain reading of sub Section (1) of Section 71 indicates that the Legislature intended the said provision to be invoked by a society or financing bank or federal society through an application before the Registrar for recovery of arrears of any sum advanced to any of their members. The provision therefore mentions only in what circumstances the procedure in Section 71 can be invoked and does not mention against whom it can be invoked. If there are dues by any borrower, who is a member to a society or a financing bank, and if such borrowing is covered by guarantee, the language in sub Section (1) of Section 71, in my opinion, covers recovery of the amount due not only from the member who borrowed but also from the surety/guarantor. This is because under law, a creditor can recover the amount due not only from the principal borrower but also from the surety and in fact, Section 128 of the Contract Act makes the liability of the surety coextensive with that of the principal debtor.

19. The Supreme Court in **State Bank of India Vs. Messrs. Index Port Registered and others**[4], had declared that a creditor cannot be forced to exhaust his remedy against principal borrower before proceeding against the guarantor and held that if on principle, a guarantor could be sued without even suing the principal borrower, there is no reason even if a decretal amount is covered by a mortgage decree, to force the decree holder to proceed against the mortgaged property first and then to proceed against the guarantor.

[4] AIR 1992 S.C. 1740

20. Therefore, the creditor bank had a choice to recover the amount due from its borrowers by (i) only suing the borrowers or (ii) only suing the guarantor or (iii) suing both. So the finding of 2nd respondent-Tribunal that the first petitioner should have first proceeded against the borrower and should have also impleaded the borrowers in the application filed under Section 71 before 2nd petitioner, cannot be accepted.

21. That apart the remedies, given to a creditor under the A.P. Cooperative Societies Act, 1964 to recover dues, are mentioned in not only Section 71 but also Section 61 and Section 101. Section 61 contemplates a more elaborate procedure by way of adjudication of disputes among persons mentioned therein including members, past members, diseased members and the society or disputes between the society or any other society also.

22. The provisions of Section 71 have been interpreted by a Division Bench of this Court in its order dt.27-07-1973 in W.A.No.516 of 1972. The Division Bench held that a transaction of loan constitutes dispute within the meaning of Section 71 and so, the surety for the loan gets himself attached to the dispute. It observed that sub Section (1) of Section 61 merely states as to what constitutes the “dispute” and it does not relate as to when that dispute is referred to Registrar as to who should be made parties to the dispute. It held that since liability of the surety also arises out of the same transaction of a loan between borrower and the creditor, there is no reason why

the claim against the surety regarding such a transaction should not come within the meaning of a “dispute” touching the business of a society arising between the society and any other society. It observed that a creditor is not bound to split the action and is entitled to include before the arbitration all parities who have held themselves liable under the same contract for the loan as parties to the arbitration. It also considered the explanation to Section 61 and said that by necessary implication and by force of logic, the claim of the creditor as against the surety must necessarily be treated as a “dispute” within the meaning of said section.

23. This Division Bench judgment has been followed by subsequent Division Bench in **N.S.Sreenivasan** (1 supra). In that case, it was sought to be contended that the decision of the earlier Division Bench in W.A.No.516 of 1972 was a case where the surety was also a member and that the Bench in that case did not consider whether a non-member surety could be a party to the dispute. This contention was negatived by the latter Division Bench. It held that though as a fact, the appellant in the Writ Appeal No.516 of 1972 was a member of the loanee society, yet he could not have been a member of the Cooperative Central Bank in view of the bar contained in the first provision of Section 19, and so the Division Bench in W.A.No.516 of 1972 was in fact deciding a case where dispute was maintainable against a non-member surety only.

24. If in regard to Section 61, this Court had taken a view that the provision therein covers proceedings against surety also on the logic that the surety by offering himself as such becomes attached to the loan transaction and comes under the liability which is same as that of the principal debtor, there is no reason why the same logic cannot be applied for interpretation of Section 71.

25. In this regard it is pertinent to note that vide G.O.Ms.No.53 Agriculture and Cooperation (Coop-II) Department dt.20-05-2016, the State of Telangana had amended Section 71 of the Telangana Cooperative Societies Act, 1964 by providing for filing of applications against guarantors also specifically. Probably the Legislature wanted to give a quietus to the issue by clarifying the legal position.

26. I am therefore of the opinion that reasoning of 2nd respondent-Tribunal that only principal borrower could be proceeded with under Section 71 of the Act and not the surety like 1st petitioner, is clearly erroneous and cannot be sustained. Its further contention that non-joinder of the borrowers is fatal to the proceedings initiated before 2nd petitioner by 1st petitioner is also unsustainable since there is no requirement of law that a borrower should also be a party to the proceedings for recovery of amount against a surety. So it was not necessary for the 1st petitioner to implead all the 267 borrowers in the proceedings under Section 71 of the Act initiated by it before the 2nd petitioner.

27. Accordingly, the Writ Petition is allowed; the order dt.13-09-2005 in C.T.A.No.75 of 2003 on the file of 2nd respondent-Tribunal is set aside; and the matter is remitted back to 2nd respondent to consider the factual disputes, if any, raised by 1st respondent as to his liability. After hearing 1st respondent and the 1st petitioner bank in that regard, without going into the question about whether the 1st respondent can be proceed with under Section 71 of the Act, the 2nd respondent shall decide the matter within three months from the date of receipt of a copy of this order. The 1st respondent is granted liberty to raise all other factual and legal contentions on facts other than the issue about maintainability of the application of Section 71 against a surety in the proceedings before 2nd respondent-Tribunal. No costs.

28. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-08-2017
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