HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 2377 of 2017

ORDER:

1) The present Civil Revision Petition is filed under Section 115 of C.P.C. aggrieved by an order dated 21.02.2017 passed in E.P.No.72 of 2015 in A.R.C.No.67 of 2013 on the file of the Principal Junior Civil Judge, Tirupati.

2) For the sake of convenience, the parties hereinafter will be referred to as arrayed in E.P.

3) The brief facts of the case are that the decree holder obtained an award on 25.01.2013 against J.Dr.Nos.1 to 5 stating that they are jointly and severally liable to pay the awarded amount together with interest. As no money was paid, the decree holder filed E.P.No.72 of 2015 for execution of the decree. All the judgment debtors were made as respondents in the said E.P. The decree holder opted for execution of the decree against judgment debtor No.5 by way of attachment of salary. The judgment debtor No.5 resisted the execution by filing a counter stating that the E.P. ought to have been filed against the principal borrower and the said ground alone is sufficient to dismiss the E.P. It is further stated in the counter that the principal borrower ie. Judgment debtor No.1 is having capacity to pay the E.P.amount as he is running a Digital Colour Lab and only to gain wrongfully, the decree holder has filed the E.P. against judgment debtor No.5, leaving the other judgment debtors.

4) After considering the rival submissions the trial Court allowed the E.P. Aggrieved by the same, judgment debtor No.5 filed the present Civil Revision Petition.

5) Reiterating the arguments advanced before the trial Court, learned counsel for the petitioner would submit that the steps taken by the decree holder in proceeding against J.Dr.No.5 is contrary to Section 128 and 146 of the Indian Contract Act, 1872. Relying upon the judgment of the Apex Court in *Ram Kishun and others v. State of U.P. and others*[1], learned counsel for the petitioner submits that the proceeding against judgment debtor No.5 leaving the principal borrower, who has enough sources to repay the debt amount, is illegal and improper. According to him, when there are morethan one surety, the liability has to be shared equally unless agreement provides otherwise. The same is opposed by the learned counsel for the respondent/plaintiff contending that in view of the judgment of the Apex Court in *Central Bank of India v. C.L.Vimla and others*[2], wherein the judgment of Ram Kishun (1 supra) was also considered, it is the discretion of the decree holder to proceed against any of the parties since the award was passed holding all the judgment debtors jointly and severally liable to pay the amount with interest.

6) From the arguments advanced it is clear that the award which has been passed by the trial Court was made executable jointly and severally, against the judgment debtors. Such being the position, the question is whether the decree holder was right in getting the decree executed only against judgment debtor No.5, leaving all other judgment debtors though the principal borrower has enough source to repay the amount.

7) As stated earlier, the award came to be passed against all the judgment debtors.

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[1] (2012) 5 ALT 39 (SC)
[2] (2015) 7 SCC 337

8) In Central Bank of India (2 supra) after considering Ram Kishun and others case (1 supra) the Apex Court held as under:

> "We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature.
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> In Ram Kishun and Ors. v. State of U.P. and Ors., (1 supra), this Court has held that "in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor." The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.
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> In the case of Ram Kishun (1 supra), this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed:
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> "Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance".

Thus, we are of the view that in the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception."

9) Similarly a Bench of this Court in *M.Rama Rao v. Sriram City Union Finance Limited*[3] a Division Bench of this Court held as under:

"It is not in dispute that the award was passed jointly and severally against the petitioner as well as the principal borrower. The said award passed by the arbitrator has become final because it has not been challenged. Section 128 of the Indian Contract Act, 1872 reads as followed:

Surety's liability: The liability of the surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract....

From the above provision, it is clear that the word co-extent is an objective for the word 'extent' and it can relate only to the quantum of the principal debt. Hence, surety or guarantor is equally liable to pay the principal debt.

In view of the law laid by this Court coupled with Section 128 of the Indian Contract Act, it is clear that it is for the decree holder to proceed against the principal borrower or surety/guarantor. Hence, we hold that the decree holder can proceed to recover the amount in accordance with law against principal borrower or guarantor or both simultaneously."

[3] (2014) 6 ALT 69 (DB)

10) From the judgments referred to above, it is clear that the decree holder can proceed against any one of the judgment debtors and he is not required to proceed against the principal borrower at the first instance. Therefore, the order passed by the trial Court is strictly in accordance with law and the same warrants no interference.

11) Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. Consequently, the Miscellaneous Petitions pending if any shall stand closed.

JUSTICE C. PRAVEEN KUMAR

22.06.2017
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