THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.3817 of 2010

ORDER:

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908 ('the Code') by the unsuccessful Decree Holder is directed against the order, dated 24.12.2009, of the learned IV Senior Civil Judge, City Civil Court, Hyderabad, passed in E.P.No.80 of 2009 in O.S.No.256 of 2007.

2. I have heard the submissions of *Sri P.Durga Prasad*, learned counsel for the petitioner/Decree Holder (hereinafter, 'DHr') and of *Sri Francis*, learned counsel appearing for the 6th respondent/6th judgment debtor (hereinafter, 6th JDr). I have perused the material record.

3. The facts, in a nutshell, are as follows:

The DHr, M/s. Margadarsi Chit Fund Private Limited, represented by its Principal Officer, obtained a decree for recovery of money against the defendants/judgment debtors 1 to 6. The relevant term of the decree in O.S.No.256 of 2007 reads as under:

> "1) That the Defendants No.1 to 6 do pay jointly and severally to the plaintiff or a sum of Rs.7,16,494/- with costs together with interest on Rs.6,40,000/- at the rate 12% per annum from the date of Suit till the date of realization.
> 2) xxx xxx xxx"

The said decree has become final.

The DHr filed the execution petition before the Court below for realization of the decree debt by way of attachment and sale of EP schedule movable properties of the 6th JDr. The 6th JDr resisted the execution petition *inter alia* contending that the DHr with *mala fides* filed the execution petition against the 6th JDr who is a guarantor without executing the decree against the principal debtor/1st judgment debtor and that as per the provisions of the Indian Contract Act, if for any reason, it emerges that the amount cannot be recovered from the 1st judgment debtor, then only, the DHr is entitled to proceed against the other judgment debtors, who are guarantors, but the DHr cannot proceed against the guarantors for realization of the decree debt without first proceeding against the principal debtor, who is the 1st judgment debtor in the present case.

4. On merits, the executing Court having accepted the contention of the 6th judgment debtor dismissed the execution petition as the DHr failed to proceed against the principal debtor/1st judgment debtor and could not explain any reasons for filing the execution petition against the 6th judgment debtor who is a guarantor.

5. Aggrieved thereof, the DHr filed this revision petition.

6. The learned counsel for the revision petitioner/DHr would submit as follows:

'The orders of the executing Court are opposed to the spirit and object of the provisions of Order XXI Rules 30 and 43 of the Code. The decree obtained by the DHr against the defendants/JDrs would clearly indicate that the liability is joint and several liability and that the liability of the guarantors is co-extensive with that of the principal debtor as per the provision of Section 128 of the Indian Contract Act. The trial Court failed to follow the decision of the Supreme Court in State Bank of India v. Messrs Indexport Registered and others[1] and other decisions, wherein the legal position is settled and which was followed by a Division Bench of this Court in Chalapathi Chit Fund Private Limited v. Adusumalli Malleswara Rao and others[2].'

7. *Per contra*, the learned counsel for the 6th JDr while supporting the order of the executing Court impugned in this revision would contend that the trial Court followed the decisions of this Court; and, the DHr with a *mala fide*

[1] AIR 1992 SC 1740
[2] C.R.P.No.2980 of 2009 dated 15.06.2010

intention failed to proceed against the principal debtor/1st judgment debtor and intentionally dragged the 6th JDr and sought attachment and sale of his movable properties by filing the execution petition against the 6th JDr, who is a guarantor, and that the said approach of the DHr is not only *mala fide* but also against the settled principles of law and the provisions of the Indian Contract Act.

8. The only question involved in this revision is:

> Whether the 6th JDR/ guarantor is entitled to restrain the DHr from executing the decree against him till the DHr has exhausted all his remedies against the 1st judgment debtor/ principal debtor?

9. To begin with, it is to be noted that the decree that was obtained by the DHr against the defendants/JDrs 1 to 6 has become final. As already noted, under the terms of the decree, all the judgment debtors are jointly and severally liable to pay the decree debt with interest and costs to the DHr. It is an admitted fact that the DHr filed execution petition against the 6th JDr, who is a guarantor, for realization of the decree debt by attachment and sale of the movable properties of the 6th JDr, which are shown in the EP schedule. Section 128 of the Indian Contract Act clearly lays down that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. In the case on hand, it is not the case of the 6th JDr/guarantor that there is a contract to the contrary. Further, as already noted, the decree which has become final postulates that the liability of the all the judgment debtors is joint and several.

10. In the decision in State Bank of India (1 supra), the Supreme Court held as follows:

> "In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including

the guarantor. It is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the Contract".

In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728, it is observed thus:

> "Co-extensive Surety's liability is co-extensive with that of the principal debtor. A surety's liability to pay the debt is not, removed by reason of the creditor's omission. To sue the principal debtor, the creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

In Chitty on Contracts 24th Edition Volume 2 at page 1031 paragraph 4831 it is stated as under,

> "Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

The said authoritative pronouncement of the Supreme Court was followed by a Division Bench of this Court in Chalapathi Chit Fund Private Limited case (2nd supra). Further, the Division Bench of this Court overruled the decision of the learned Single Judge of this Court, which was relied upon by the executing Court. There cannot be any dispute in regard to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act 1872, the liability of the guarantor/surety is co-extensive with that of the principal debtor. 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.

[Vide: The Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr.: AIR 1969 SC 297; Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam and Anr: AIR 1982 SC 1497; Union Bank of India v. Manku Narayana: AIR 1987 SC 1078; and State Bank of India v. Messrs. Indexport Registered and Ors.(1 supra)].

11. In view of the settled legal position, the impugned order of the executing Court holding that the execution petition filed for execution of the decree against the 6th judgment debtor/guarantor without proceeding against the principal debtor/1st judgment debtor is not maintainable is unsustainable. In that view of the matter, this Court holds that the revision petition deserves to be allowed.

12. In the result, the Civil Revision Petition is allowed and the impugned order dated 24.12.2009 passed in E.P.No.80 of 2009 in O.S.No.256 of 2007 is set aside. The executing Court is directed to entertain E.P.No.80 of 2009 and dispose of the same, in strict accordance with the procedure established by law.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, in this revision shall stand closed.

M. SEETHARAMA MURTI, J

03.02.2017
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