

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Ex. FA No. 16/2016 & CM No. 23801/2016**

% **17th April, 2017**

ANIL THAKKAR & ORS. Appellants

Through: Mr. A.K.Singla, Sr. Adv. with
Mr. A.K.Mehta and Mr. Adbhut
Pathak, Advocates.

versus

SHALU KAPOOR Respondent

Through: Mr. Malaya Kumar Chand and
Mr. J.K.Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. By this Execution First Appeal, the appellants/objectors impugn the judgment of the executing court dated 9.6.2016, by which the executing court has dismissed the objections filed and held that the cheque given by the appellant no.1, and who is the father of the defendant no.1/judgment-debtor no.1, is liable for encashment of cheque given by him towards satisfaction of the judgment and decree dated 2.12.2009.

2. The facts of the case are that the respondent/plaintiff filed a suit under Order XXXVII CPC for recovery of Rs.18 lacs along with

interest. The suit was filed on the basis of cheque which was issued by the two defendants in the suit. The first defendant in the suit was Sh. Jatin Thakkar who is the son of the appellant no.1/Sh. Anil Thakkar, and the second defendant in the suit was Smt. Falguni Thakkar wife of the defendant no.1/Sh. Jatin Thakkar.

3. Order XXXVII CPC suit was decreed on account of non-appearance within time of the defendants in the suit, and therefore, the suit was decreed for a sum of Rs. 18 lacs along with interest at 8% per annum *pendente lite* and till realization.

4. Since the judgment-debtors did not make payment under the subject judgment and decree dated 2.12.2009, the respondent/decreed holder filed the subject execution proceedings. In the execution proceedings the executing court issued warrants of attachment dated 11.2.2010 pursuant to the order of attachment of properties of the executing court dated 20.1.2010. Warrants of attachment were issued as per the list of properties attached along with the execution application and this list of properties reads as under:-

“LIST OF MOVEABLE AND IMMOVEABLE ASSETS OF JUDGMENT-DEBTOR
MOVEABLE ASSETS

1. Stocks of all kinds.
2. Fans, AC, Coolers, Refrigerators, Cooking range, Electricity items of all kinds.
3. Machinery, Generator etc.
4. Furniture, Printer, computer & Motor cars etc.
5. Cash in hand, cash lying in mentioned addresses, depositing in the bank and jewellery.

6. Any other attachable items.

IMMOVEABLE ASSETS

1. B-27, Swasthya Vihar,
Vikas Marg, New Delhi-92
2. C-21, Second Floor
Vishal Residency,
Opp. Dev Priya Banglow, Ramdev Nagar,
Satellite, Ahmedabad, Gujarat”

5. Pursuant to the warrants of attachment issued by the court as per its order dated 20.1.2010, the respondent/decree holder was allocated a bailiff and this bailiff went to the address at B-27, Swasthya Vihar, Vikas Marg, New Delhi. At this address, admittedly none of the defendants/judgment debtors were found, but the father of defendant no.1/judgment-debtor no.1/Mr. Jatin Thakkar was found, (being the appellant no.1 herein), and the appellant no.1/father herein gave a statement before the bailiff who was accompanied by a police constable. As per the statement of the appellant no.1 he was not at the house when the bailiff reached the spot and on reaching the house he has recorded that he has given cheque no. 559907 dated 6.3.2010 in favour of the executing court for a sum of Rs.18,76,514/- for satisfaction of the decree. On taking this cheque, the bailiff returned the warrants along with the cheque and duly recorded the statement of the appellant no.1 of having paid the cheque towards satisfaction of the decree.

6. Appellants thereafter filed objections. Appellant no.1 filed objections on the ground that he is not liable to pay under the subject judgment and decree as he was not a defendant in the suit and hence not a judgment debtor. Appellant nos. 2 and 3 filed objections on the ground that they were the owners of the property B-27, Swasthya Vihar, Vikas Marg, New Delhi and not the judgment-debtors. Appellant nos. 2 and 3 filed documents in support of their ownership of B-27 property.

7. By the impugned judgment, the executing court has recorded that no execution can take place against appellant nos. 2 and 3 as B-27 property as per the documents was of the appellant nos. 2 and 3 and not of the judgment-debtors. There is no challenge by the respondent/decree holder to this part of the impugned judgment dated 9.6.2016, and therefore, so far as appellant nos. 2 and 3 are concerned there is finality that property no. B-27 cannot be attached and sold in execution of the judgment and decree dated 2.12.2009. The only issue to be examined by this Court is whether the appellant no.1, aged father of the defendant no.1/judgment debtor no.1, is liable on the ground that he has given the cheque in satisfaction of the decree to the bailiff.

8. The executing court, as per its impugned judgment has relied upon the provision of Order XXI Rule 2 Sub-Rule 2 CPC to hold

that a person who stands as a surety would be liable to make payment under the decree. Order XXI Rule 2 Sub-Rule 2 CPC reads as under:-

“2. **Payment out of Court to decree-holder**

(2) The judgment-debtor or any person who has become surety for the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.”

9. Though the executing court on law is correct in holding that a surety who agrees to pay a money decree would be liable for satisfaction of the money decree, but the applicable provision of law is not Order XXI Rule 2(2) CPC but the provision is Section 145 CPC and which provision reads as under:-

“**Section 145. Enforcement of Liability of surety.**- Where any person has furnished security or given a guarantee -

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner therein provided for the execution of decrees, namely:-

- (i) if he has rendered himself personally liable, against him to that extent;
- (ii) if he has furnished any property as security, by sale of such property to the extent of the security;
- (iii) if the case falls both under clauses (i) and (ii), then to the extent specified in those clauses,

and such person shall, be deemed to be a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.”

10. A reading of Section 145 CPC along with its heading shows that it is only when a person agrees to stand as a surety would then such a person be liable to satisfy the money decree. Standing as surety is a conscious act, and by specific language, that, the surety is standing as a surety/guarantor for discharging the liability under the money decree. We have therefore to examine the statement recorded of the appellant no.1 on 4.3.2010 to the bailiff as to whether this statement records the liability of the appellant no. 1 to be liable as surety/guarantor for his son who is defendant no. 1/judgment-debtor no. 1. I may also note that the indubitable position which appears on record is that the defendants in the suit, and who are the husband and wife, being the son and daughter-in-law of the appellant no. 1, are not residing in the property at B-27, Swasthya Vihar, Vikas Marg, New Delhi and where the warrants of attachment were taken for execution, because, it is seen that in the memo of parties in the suit itself the respondent/decreed holder, had in addition to giving the address of Swasthya Vihar property given another address of the defendants/judgment debtors being C-21, Second floor, Vishal Residency, Opposite Dev Priya Banglow, Ramdev Nagar, Satellite, Ahmadabad, Gujarat. In fact, the delayed appearance which was filed

by the defendants/judgment debtors also specifically gave this very Ahmadabad address as a residence of the defendants/judgment debtors.

11. Objections of the appellants in this case were decided after leading evidence and in the evidence which is led on behalf of the appellants they have deposed that the judgment debtors had left the suit property at Swasthya Vihar quite some time back and were not residing in the same but were residing at Ahmadabad. As per the evidence which has come on record, it has to be held that the defendants/judgment debtors are not residents of the Swasthya Vihar property at New Delhi. Also, I may note that no evidence whatsoever, much less credible documentary evidence, has been led on behalf of the defendants/judgment debtors of the defendants/judgment debtors residing at Swasthya Vihar property, New Delhi. As already stated above objections of appellant nos. 2 and 3 have already been accepted and it has been held that Swasthya Vihar property belongs to the appellant nos. 2 and 3, and who are the other son of the appellant no. 1 and the wife of the other son.

12. In law, there cannot be liability of an aged father for discharging the debts of his son, and which son was the defendant no. 1 in the suit and the judgment-debtor no. 1 in the execution proceedings. Father and son are independent legal entities and there is no law that

liability of the son is the liability of the father. Therefore, the only way in which liability can be fastened upon the father/appellant no. 1 was in terms of Section 145 CPC and which requires specific language of the appellant no. 1 agreeing to stand as a surety/guarantor to discharge the liability of his son/defendant no. 1/judgment-debtor no.1 or the liability of the defendants/judgment-debtors, and who are the son and daughter-in-law of the appellant no. 1.

13. This Court also cannot overlook the fact that when the bailiff along with the police goes for execution of the warrants of attachment, there is bound to be a considerable amount of consternation, and in such circumstances when a cheque is given by the appellant no. 1, no doubt that cheque was given towards discharge of liability under the decree, but such liability of the appellant no. 1 would only be a valid liability if it falls within the four corners of Section 145 CPC. The statement of the appellants no. 1 in no manner records the liability of the appellant no. 1 to stand as a surety/guarantor for discharging of the liability of the defendants/judgment debtors in the suit, and therefore, on the facts of this case the essential ingredients of Section 145 CPC are not made out for fastening the liability of the defendants/judgment debtors in the suit as against the appellant no. 1.

14. Learned counsel for the respondent sought to argue that there was an HUF, and therefore, appellant no. 1 as a Karta of an HUF would be liable to discharge the liability of his son being the defendant no.1/judgment debtor no. 1, however, such self-serving statement made by the respondent/decreed holder of existence of HUF cannot create an HUF because existence of an HUF along with its funds and properties have to be proved by clear cut evidence, inasmuch as, otherwise the position would mean that a father would end up discharging the monetary liability of his son and to which the aged father in no manner was responsible for creation.

15. No doubt facts of the present case are harsh facts as against the respondent, however, the entitlement of the respondent/decreed holder is to pursue for recovery of the amount under the money decree as against the defendants/judgment-debtors, and not as against the appellant no. 1, the aged father of the judgment-debtor no. 1/defendant no. 1.

16. In view of the above discussion this appeal is allowed. The impugned judgment of the executing court dated 9.6.2016 is set aside. It is held that appellant no. 1 is not liable to discharge the liability in terms of cheque No. 559907 dated 6.3.2010 of Axis Bank Limited, Swasthya Vihar, New Delhi for a sum of Rs.18,76,514/-.

Respondent/decreed holder is however at liberty to continue the execution proceedings as against the judgment debtors being the two defendants in the suit.

APRIL 17, 2017
ib/Ak

VALMIKI J. MEHTA, J

