

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.19415 of 2010

=====

Yamuna Prasad Son of Late Naurangi Mahto, R/o Village Narainpur P.S.
Ekangar Sarai, District Nalanda

... .. Petitioner

Versus

1. The State of Bihar
2. Collector, Nalanda
3. District Recovery Tribunal Patna
4. Certificate Officer, Debt Recovery Tribunal, Patna.
5. Allahabad Bank at Chowk, P.S. Chowk, Patnacity, Patna through its Regional Manager.
6. Allahabad Bank at Chowk, P.S. Chowk, Patnacity, Patna through its Branch Manager.
7. M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Kariawan, P.O. Bhatahar, P. S. Chandi, District Nalanda
8. Moti Lal Vidyarthi S/o Late Saryoo Sah, Member of Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Kariawan, P.O. Bhatahar, P. S. Chandi, District Nalanda
9. Sri Ravi Ranjan Singh S/o Suresh Prasad Sigh, Secretary of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Kariawan, P.O. Bhatahar, P. S. Chandi, District Nalanda A/p Assistant Teacher Middle School Sauda di, District Ranchi, Jharkhand.
10. Nawal Kishore Prasad S/o Aakloo Mahto, Cashier of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Harpur, P.O. Bhatahar, P. S. Chandi, District Nalanda, A/p Asst. Teacher, C.C.C.L. High School, Baraka Kana, Ramgarh Cantt. District Hazaribagh.
11. Jugeshwar Prasad S/o Sri Gaithan Mahto, Member of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Berwan, P.O. Bhatahar, P. S. Chandi, District Nalanda
12. Ram Bachan Prasad, S/o Late Shyamlal Ram, Member of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Berwan, P.O. Bhatahar, P. S. Chandi, District Nalanda A/p posted in Electric Office, Doranda Ranchi, Finance Deptt., Division No. 1, Phone No. 9835325221
13. Sohrai Choudhary S/o Sri Kesho Choudhary, Member of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited, Village Bhatahar, P.O. Bhatahar, P. S. Chandi, District Nalanda

... .. Respondents

=====

Appearance :

For the Petitioner	:	Mr. Mahesh Prasad No. 2 Mr. Rewti Kant Raman, Advocates
For the State	:	Mr. Durgesh Nandan, AAG 14 Mr. Jitendra Kumar, AC to AAG 14
For Respondent-Bank	:	Dr. Binod Kumar Jha, Advocate

=====



CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date : 30-11-2018

The present writ petition has been filed for quashing the entire proceeding of execution case no. 55/2000 which was initiated against the petitioner by the respondent-Certificate Offer (Annexure 1) whereby he is proceeding to realize Rs. 17,679.00/- from the petitioner on the basis of a requisition dated 10.10.2000 for realization of a money decree prepared on 22.06.1987.

2. The short facts of the case according to the petitioner are that the respondent nos. 7 to 13 and two other persons namely Saryoo Sah and Suresh Prasad Singh (defendant nos. 2 and 3 in Execution Case No. 55/2000) applied for sanction of loan amounting to Rs.77,100/- for purchasing a chassis and Rs. 30,400/- for meeting expenses for bus body building, by Allahabad Bank (respondent nos. 5 and 6). The Bank sanctioned a loan of Rs. 1,07,500/- to the applicants which was withdrawn (Rs. 77,100/- on 06.10.1976 and Rs. 30,400/- on 11.11.1976) on execution of two Demand Promissory Notes and a letter of hypothecation of the vehicle was made. Thereafter, upon the resignation of Nawal Kishore Prasad (respondent no. 10) in 1977, the petitioner applied for membership of M/s Kariawan Shikshit Berojagar Motor Pariwahan Sahkari Samiti Unlimited (respondent no. 7). On default in payment of the loan by the borrowers, the vehicle came to be seized on 22.11.1977 with the assistance of the petitioner on the assurance of the Bank that he would be recognized as a member of the Society. It is



alleged that the bank obtained the petitioner's signature on the bank guarantee and as such, it has proceeded against the petitioner for recovery of the loan by instituting Money Suit No. 21 of 1981 against the petitioner (defendant no. 9). During the pendency of the said Money Suit, Naurangi Mahto, father of the petitioner (defendant nos. 8 and 10 in the said Money Suit) died on 01.03.1981 but the suit continued without substitution and a decree was passed on 22.06.1987 in favour of the plaintiff-Allahabad Bank. Subsequently, Suresh Prasad Singh (defendant no. 3 in the said Money Suit) who was the Secretary of the Society resigned as such and joined Government service. Upon his death on 14.08.1998, his son Rajiv Ranjan Singh was appointed in service on compassionate ground. The execution case was filed for recovery on 10.10.2000 without filing certified copy of the judgment and decree passed in the said Money Suit which was later on waived. It is further stated that the Bank filed Execution Case No. 55 of 2000 on 10.10.2000 and a certificate for recovery was prepared by the Debts Recovery Tribunal on 31.01.2001 for execution of the decree. Thereafter, on 25.08.2001, Saryoo Sah (defendant no. 2 in the said Money Suit) also died.

3. Learned counsel for the petitioner has challenged the validity of the recovery proceeding on three grounds, namely,

(a) that Execution Case No. 55 of 2000 filed on 10.10.2000 was time barred and could not have been instituted for execution of the decree passed on 22.06.1987 in Money Suit No. 21 of 1981.



(b) that recovery cannot be effected against the petitioner in his capacity as guarantor without first recovering the dues from the principal debtors in view of the authoritative decision of the Hon'ble Supreme Court in Pawan Kumar Jain Vs. The Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Ors reported in 2004(4) PLJR (SC) 55.

(c) that the decree passed in Money Suit No. 21 of 1981 was a nullity and the same has been passed against a dead person. Reliance has been placed on the decision of this Court in M/s Shobha Coir Foam Pvt. Ltd Vs. State of Bihar & Ors reported in 2006(2)PLJR 571 and a decision of Hon'ble Calcutta High Court in Himangshu Bhusan Kar and others Vs. Manindra Mohan Saha reported in AIR 1954 Calcutta 205.

4. It is submitted that the averment made in the writ petition stands largely admitted inasmuch as the counter affidavit has been filed without giving a para-wise reply.

5. Learned counsel for the respondent-Bank, on the other hand, opposes the writ petition and relies on the averments made in the counter affidavit.

6. As regards the issue of limitation, it is submitted that the respondent-Bank had filed its application in Execution Case No. 55 of 2000 before the Debts Recovery Tribunal on 18.06.1999 itself which is well within the period of limitation.

7. It is further submitted that decree passed without substitution upon death of the petitioner's father Naurangi Mahto during its pendency,



would not stand in the way of its execution against the petitioner, who as guarantor was jointly and severally liable with the borrowers to pay the dues of the Bank on the terms and conditions of the loan document.

8. Having heard learned counsel for the parties and on careful consideration of the materials available on record, this Court finds the writ petition to be completely devoid of merit. A bare perusal of the order sheet of the Debts Recovery Tribunal discloses that an application was filed by the Bank for execution under Section 31A(2) of the Recovery of Debts Due to Bank and Financial Institutions Act (Annexure-1) on 18.06.1999 itself which was well within the time of limitation for execution of the decree dated 22.06.1987. The order sheet dated 10.10.2000 of the Debts Recovery Tribunal also clearly shows that the certified copy of the judgment and certified copy of preliminary decree were on record and filing of the final decree was waived. As such, the petitioner's submission that the certified copy of the judgment and decree were not on record does not appear to be correct. The submission of the petitioner that the application of the Bank before the D.R.T. was invalid as being barred by limitation cannot therefore be accepted as the same is found to have been presented on 18.06.1999 which was well within time.

9. The petitioner has next contended that the decree passed against a dead person is void and a nullity which could not have been made the subject matter of execution before the D.R.T. In the instant case, however, it transpires that the petitioner has been proceeded against as



guarantor of the loan and not as heir of his late father, Naurangi Mahto, one of the borrowers. It is not in dispute that the guarantor was jointly and severally liable alongside the borrower in terms of the loan documents. A clear stand in this regard has been taken in the counter affidavit of the Bank which has not been denied or disputed as no rejoinder has been filed by the petitioner. Section 128 of the Contract Act states that “liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.”

10. The decision of a Bench of this Court in M/s Shobha Coir Foam Pvt. Limited (supra) relied upon by the petitioner has been rendered in a completely different context wherein certificate proceedings had been instituted against that writ petitioner and the challenge was based on two grounds, (i) In the Deed of Agreement, there was no clause providing that the dues would be recoverable as public demand and (ii) the proceedings were based on a certificate signed by one Shri O.P. Singh, Assistant Law Officer in the BICICO, who was appointed as the Certificate Officer. It was held in that background by this Court, taking note of the observations in the case of Bihar State Credit & Investment Corporation Limited vs. Rajani Ranjan Sahau & Ors. and other analogous cases, 2006(1) PLJR 212, that -

“Any argument up-holding the validity of the proceedings by introducing a competent Certificate Officer in the middle of the proceedings would amount to trying to revive a dead child by giving it in the hands of a different nurse. I am, therefore, satisfied that the Certificate case that was illegal



and invalid at its inception cannot be allowed to proceed simply by the introducing of a new Certificate Officer.”

11. Similarly, the decision of the Hon’ble Calcutta High Court in Himangshu Bhusan Kar and others (supra) also does not come to the aid of the petitioner which was rendered in the context of Rule 3 of Order XXII of the Code of Civil Procedure, which in turn contains provisions which apply in the event of death of the plaintiff. The nature of the present case is more appropriately covered under Order XXII Rule 4 of the CPC. In any event, it was held in paragraph 9 of the decision of the Hon’ble Calcutta High Court as follows –

“I may also note that even if the case came under Rule 3 of Order 22 and there was in law an abatement of the suit, that also would not make the decree eventually passed in the suit as one without jurisdiction and in that case also the executing court will not be entitled to refuse to execute it on that ground. It would no doubt be open to the defendants in such a case to challenge the decree in appeal or in a proper case in revision or to have it set aside in the suit itself by appropriate proceedings but so long as the decree stands the executing Court is bound to execute it according to its terms.”

12. From the above it becomes apparent that the decree cannot be said to have abated as in the present case, the petitioner as guarantor was liable jointly and severally along with the principal debtors and his liability was co-terminus with them.



13. As regards the last submission of the petitioner to the effect that the applicant-Bank could not have proceeded against the petitioner as guarantor without first effecting recovery from the principal debtors as held in the decision of the Supreme Court in Pawan Kumar Jain's case (supra), the same is also misconceived. The petitioner clearly appears to have missed that the judgment in the said case was rendered in the background of the specific provisions of Section 4 (2) (b) of the U.P. Public Moneys (Recovery of Dues) Act, 1972, which reads as follows –

“...(b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceeding may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first mentioned process within a reasonable time.”

14. It is therefore evident that there was specific provision on the said Act providing for recovery first by sale of property under the mortgage, charge or encumbrance belonging to the persons taking the loan, and any other proceeding could be taken thereafter upon certificate of the Collector that there was no prospect of realization of the entire sum due through the first mentioned process. On the other hand, as already noticed above, Section 128 of the Contract Act provides that the



liability of the guarantor shall be co-terminus with the principal debtor and becomes applicable in the instant case.

15. For the reasons stated above, this Court finds no infirmity, illegality or invalidity in the impugned recovery proceedings against the petitioner. The writ petition stands dismissed.

B.T/Chandran

(Vikash Jain, J.)

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	04.12.2018
Transmission Date	

