NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 15-07-2019

Judgment delivered on 19-8-2019

FA No. 301 of 2017

1. Poonam Mishra W/o Late Shashank Mishra, Aged About 46 Years R/o T-99, 3rd Floor, Lajpat Nagar-2, New Delhi
2. Pranita Mishra D/o Late Shashank Mishra, Aged About 19 Years R/o T-99, 3rd Floor, Lajpat Nagar-2, New Delhi
3. Sucheta Mishra D/o Late Shashank Mishra, aged about 25 Years R/o T-99, 3rd Floor, Lajpat Nagar-2, New Delhi .

---- Appellants/defendants No. 1 to 3.

Versus

1. Veena Mishra W/o Late Subhash Chandra Mishra, Aged About 62 Years R/o 59, Saket, Aishwarya Residency G.E.Road Raipur, Chhattisgarh.
2. Manish Mishra S/o Late Subhash Chandra Mishra, Aged About 41 Years R/o 59, Saket, Aishwarya Residency G.E.Road Raipur, Chhattisgarh.
3. Abhishek Mishra S/o Late Subhash Chandra Mishra, Aged About 36 Years R/o 59, Saket, Aishwarya Residency G.E.Road Raipur, Chhattisgarh.
4. (a) Shobha Mishra (deleted) As Per Honble Court Order Date-26-02-2019 .

   (b) Bharat Dev

   (c) Vivek Dev

   Both sons of late Ashok Kumar Mishra r/o. OM, Ahmadjee Colony, behind Netaji Stadium, Raipur.
5. Sriharsh Mishra S/o late B M D Mishra, Aged About 51 Years R/o Shailendra Nagar, Raipur, District : Raipur, Chhattisgarh
6. Smt. Manjulata Shukla W/o Shri D.K.Shukla, R/o E/83, Char Imli, Bhopal M.P.

---- Respondents/plaintiffs

For appellants	:	Mr. Ajit Singh, Advocate.
For respondents No. 1 to 3	:	Mr. Hari Agrawal, Advocate.
For respondents No. 4 to 6	:	Mr. Abhyuday Singh, Advocate

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1) This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decree dated 25-2-2017 passed by Second Additional Additional District Judge, Raipur (CG) in Civil Suit No. 73-B/2011 wherein the said court decreed the suit filed by Subhash Chandra Mishra whose legal representatives are respondents No. 1 to 3 in the present appeal and against the present appellants who are legal representatives of Shashank Mishra to the tune of Rs.3,00,000/-.

2) Shashank Mishra applied and obtained vehicular loan from the State Bank of India for purchase of Truck chassis and in the said transaction his father late B.M.D. Mishra stood as guarantor and also created an equitable mortgage of his residential house namely Saket located at Chhotapara, Raipur. Shashank Mishra failed to repay the said loan leading to initiating recovery proceedings against him and the guarantor. Suit was decreed and during execution proceeding the original borrower namely

Shashank Mishra did not satisfy the decree but the decree was satisfied by Subhash Mishra. After satisfying the decree he filed the suit against the successors of Shashank Mishra who are appellants in the present appeal. After hearing both sides, the trial Court decreed the suit against the present appellants that is why this appeal is preferred.

3) Learned counsel for the appellants would submit as under:

i) The property was mortgaged by father of Subhash Mishra i.e., BMD Mishra and same was obtained by all the sons, therefore, they are all liable for dischare of liability of their father.

ii) Looking from any angle it cannot be said that one son was under obligation to discharge liability of father, therefore, only one son namely Shashank Mishra is not liable for making payment of amount.

Iii) The trial Court failed to understand the term of guarantee and also relevant provisions of Contract Act, 1872 relating to guarantee.

iv) All the sons are equally liable for discharge of the liability of their father, therefore, finding of the trial Court is liable to be set aside.

He placed reliance in the matter of **Andanur Kalamma vs. Gangamma (dead) in Civil Appeals No. 423-424/2018 (arising out of SLP (Civil) Nos. 9728-9729 of 2005) decided on 6-3-2018, SC, Smt. Chabirani Bai and others vs. Girdharilal and others, reported in (1976) AIR (MP) 69 and Danamma @ Suman Surpur vs. Amar in Civil appeal No. 188-189 of 2018 (@SLP I(C) No. 10638-10639 of 2013) decided on 1-2-2018, SC.**

4) On the other hand, learned counsel for the respondents would submit that loan amount was borrowed by Shashank Mishra, therefore, he alone was under obligation to repay the same. When amount is paid on behalf of the guarantor for releasing the mortgage property, guarantor can recover the amount from principal debtor. He would further submit that the finding of the trial court is based on factual matrix and legal aspect of the matter which is not liable to be interfered while invoking jurisdiction of the appeal.

5) I have heard learned counsel for the parties and perused the record in which judgment/decree has been passed.

6) The question for consideration of this court is whether money was borrowed from Bank by Shashank Mishra or not and whether BMD Mishra who was father of Shashank Mishra was guarantor for loan.

7) The suit was filed by the State Bank of India, Phaphadih Branch, Raipur (MP now CG) which was registered as Civil Suit No.81-A/84 and judgment dated 7-12-1996 passed by the District Judge, Raipur, MP (now CG) is proved as Ex.P/1. As per finding of the said court it is decided that Shashank Mishra borrowed a sum of Rs.1,24,000/- in the month of May, 1979 and BMD Mishra who was his father stood as guarantor for the said loan and mortgaged his house as mentioned above. The judgment/decree passed by the court of District Judge, Raipur was not challenged and that attained finality. The decree was not satisfied by Shashank Mishra that is why Bank initiated execution proceeding which was settled by the original plaintiff before the trial Court namely Subhash Mishra for a sum of Rs.3,00,000/- which is proved by Ex.P/2, P/3 and P/4. Looking to unrebutted evidence, it is proved that Subhash Mishra paid Rs.3,00,000/- to State Bank of India, Raipur for loan which was advanced by late Shashank Mishra, therefore, it is clear from the record that Subhash Mishra acted on behalf of his father BMD Mishra who was guarantor and satisfied the decree. Immovable property house named Saket was

later on sold and as per statement of appellant No.1 Poonam Mishra (DW/1), she sold her share in the said house for cash consideration of Rs.15,00,000/- (Rupees fifteen lakhs). From her admission, it is clear that property which was mortgaged was inherited by appellant No.1 as wife of late Shashank Mishra and daughter-in-law of BMD Mishra.

8) Looking to the evidence on record it is clear that the amount of principal debtor was satisfied by Subhash Mishra as guarantor. The point for consideration of this court is what is right of surety on payment of decretal amount. Section 140 of the Contract Act, 1872 may be read as under.

> “140. Rights of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor”.

9) In view of the above legal provisions, Subhash Mishra is entitled to recover the amount which was paid as guarantor against the principal debtor. Principal debtor was Shashank Mishra and his wife inherited mortgaged property and she sold her share as admitted by her. Argument advanced on behalf of the

appellants that only one son namely Shashank Mishra is under obligation for payment of amount is not sustainable. The amount was borrowed by Shashank Mishra, therefore, he was principal debtor and he alone was responsible to clear the loan account. All the legal representatives/successors inherited the property of BMD Mishra are successors because decretal amount was paid by Subhash Mishra. Liability cannot be fastened to other successors because they did not borrow any sum from the State Bank of India, therefore, other successors of BMD Mishra were not under obligation to repay the loan amount.

10) It is further submitted on behalf of the appellants that the property which was mortgaged was joint family property, therefore, all the members of the family were under obligation to repay the loan amount. In view of this court, argument is not sustainable. As per judgment (Ex.P/1) passed by the court of District Judge, Raipur, the property was owned by BMD Mishra and it was not joint family property, therefore, all the other members of family were not under obligation to repay the loan amount.

11) Learned counsel for the appellants would further submit that earning of the truck which was purchased by obtaining loan was not used solely by Shashank Mishra, therefore, earning is used for joint family and the appellants are not liable.

12) In view of this court, argument must fail. The matter is already decided as per judgment (Ex.P/1) that Shashank Mishra borrowed sum for purchasing the truck, therefore, he alone was under obligation to repay the loan amount. This issue was not raised before the Court of District Judge, Raipur and there is no account on record that any earning of Truck was used for joint family, therefore, liability cannot be fastened to other members of family. The case laws cited by learned counsel for the appellants are of no help as the same are distinguishable from the facts of the present case.

13) In view of the above, this court has no reason to take a contrary view what is recorded by the trial Court. The appeal is liable to be and is hereby dismissed.

14) Accordingly, decree is passed in favour of respondents No.1 to 3 and against the appellants as under:

(i) The appeal is dismissed with cost.

(ii) Appellants to bear the cost of respondents No. 1 to 3. through out.

(iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.

(iv) A decree be drawn up accordingly.

Sd/-

(**Ram Prasanna Sharma**)
JUDGE

Raju