IN THE HIGH COURT OF JUDICATURE AT MADRAS

| **Reserved on** | 26.06.2023 |
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| **Pronounced on** | 15.09.2023 |

CORAM:

**THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI**

CRP (PD) No.180 of 2016
and
CMP.No. 916 of 2016

1.Paranthaman (died)

2.V.Vasudevan

3.V.Satyadevi

4.Suryaprakash

5.P.Ravichandran ... Petitioners

(Petitioners 3 to 5 brought on records as LRs of the deceased first petitioner viz., Paranthaman vide Court Order dated 26.04.2022 made in CMP.No.7495 of 2022)

Vs.

1.State Industrial Promotion Corporation
of Tamil Nadu Ltd, Represented by its
Chairman & Managing Director,
No.9-A, Rukmini Lakshmipathy Salai,
Egmore,
Chennai-600008.

2.M/S.Kanchi Prints Pvt Ltd.,
Rep by Directors
No.224-226, Kalavakkam,
Thiruporur-603 110,
Chengalpattu District.
(Given up both in the I.A and in this CRP as no such Addressee)

3.The Branch Manager,
M/s.Indian Overseas Bank,
No.87, Ist Avenue, Indira Nagar,
Chennai-600 020. ... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India seeking to set aside the order dated 8th July 2015 passed in I.A.No.630 of 2013 in SFC OP No.89 of 2013 by the Principal District Judge, Kancheepuraam.

| | | |
|---|---|---|
| For Petitioners | : | Mr.V.Krishnamoorthy for Mr.N.Suresh |
| For R1 | : | Mr.S.Sudharshana Sundar |
| For R2 | : | Given up |
| For R3 | : | No appearance |

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**ORDER**

The above civil revision is preferred as against the fair and decreetal order dated 08.07.2015 passed in I.A.No.630 of 2013 in S.F.C.O.P.No.89 of

2013, by the Principal District Judge, Kancheepuram, at Chengalpattu.

Facts:-

2.The first respondent herein filed S.F.C.O.P.No.89 of 2013 before the Principal District Judge at Chengalpattu for the following reliefs:-

A) Determining the liabilities of the respondents and directing the respondents to jointly and severally to pay the petitioner a sum of Rs.29,48,41,774/- together with interest at 14.5% from 31.03.2013 till the date of realization failing which to proceed against personally and against their properties.

B) Directing sale of schedule mentioned properties for recovery of amount due with subsequent interest and cost.

C) For the cost of the petition

D) pass such other reliefs as per Section 31(i)(aa) of State Financial Corporation Act.

While so, the revision petitioners have filed a petition under Order 7 Rule 11 r/w Section 151 CPC for rejecting the plaint, on the ground that the petition filed by the first respondent is barred under Section 446(1) &(3) of the Indian

Companies Act. The petition was resisted by the first respondent herein by stating in their counter that, the first respondent has filed the above SFC OP No.89 of 2013 under Section 31(1)(aa) of the SFC Act, 1951 against the petitioners herein, for enforcing the liability of the sureties. The trial Court upon hearing the contentions made on either sides dismissed the above petition. Against which, the present revision is preferred.

3. The learned counsel appearing for the revision petitioners would submit that the petitioners were the Directors of the second respondent's Company, which was involved in the business of textile processing and printing of silk fabrics and he had availed financial assistance from the first respondent for machineries and from the third respondent for its working capital etc. However, the business ran into financial difficulties following which the Company was wound up 31.01.1997 under orders of this Court in CP No.21 of 1992 and the Official Liquidator, Chennai was appointed on 31.01.1997 and affairs of the second respondent was taken over by the Official Liquidator on 21.04.1997. The assets of the second respondent's

company was auctioned by the Official Liquidator in furtherance to the orders of this Court in CP.No.21 of 1992 and an amount of Rs.1 crore was obtained as sale proceeds. The petitioners came to know that the respondents 1 and 3 lodged their claim for a proportionate share in the amount recovered by Official Liquidator following liquidation of the second respondent company. As admitted, the first respondent received a sum of Rs.61,40,000/- on 14.09.2006, thereby the second respondent's Company, which no longer subsists, stood discharged of the debt. Therefore, the claim of the first respondent that after adjusting the pro-rata share received, an amount of Rs.29,48,41,774/- is due and payable by the second respondent company is wholly misconceived and legally untenable. As of 14.09.2006, the claim of the first respondent stood discharged and no further claim against the second respondent is legally maintainable. Since the second respondent's Company having been liquidated on 31.01.1997 in C.P.No.91 of 1992, it ceased to carry on business within the jurisdiction of this Court as contemplated under Section 31 (1) of the State Financial Corporation Act and therefore, this Court has no jurisdiction to entertain the claim. The first respondent deliberately failed to implead the Official Liquidator in the petition as a respondent. The petition is not maintainable and is liable to be rejected in limine on the sole ground of non-joinder of necessary and proper party apart from the fact it impairs the right of the surety against the Principal Debtor.

4. The learned counsel would further submit that the petition is barred under Section 446(1)&(3) of the Indian Companies Act. The petitioner states that Sections 446(1)&(3) of the Companies Act mandate as follows:-

> *"When a winding up order has been made or the Official Liquidator has been appointed as provisional Liquidator, no suit or legal proceeding shall be commenced or if pending at the date of winding up order shall be proceeded with against the company except by leave of the tribunal and subject to such terms as the tribunal may impose"---*
>
> *"any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court"*

In the light of the above provisions, the instant petition under the SFC Act is not maintainable and is liable to be rejected. The debt of the second respondent having been discharged following the proportionate payment made by the Official Liquidator in CP No.91 of 1992, no subsisting claim remains against the petitioners as sureties of the Principal Debtor. The learned counsel for the petitioners state that Section 128 & 134 of the Contract Act 1872 stated as follows:-

> *"The liability of surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract"*

> *"The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor"*

In the light of the said provisions, the first respondent having received a proportionate claim for its entire due from the available assets, the second respondent company and the petitioners stood discharged of their liabilities on

14.09.20006 and the petition under Section 31 of the SFC Act is barred and not maintainable. The petitioners and the second respondent herein were impleaded as the sureties and the Principal Debtor respectively in O.A.No.467/97 filed by the IOB, Indira Nagar Branch, Chennai-20, before the DRT, Chennai and the respondent/plaintiff was impleaded as 9th respondent in the said proceedings. The M/s.SIPCOT participated in the above proceedings and filed their written statement on 09.03.2000 before the DRT, Chennai and based on their reply statement, the liabilities of the Principal Debtor and sureties was adjudicated and fixed by the DRT, Chennai. This fact is suppressed by the first respondent in the petition filed by him before the Company Court. Moreover, the petition filed by the first respondent is time barred from the date of their foreclosure of the account on 09.11.1992 and their failure in furnishing any details of the mortgaged and hypothecated property for sale, their prayer seeking for a direction for sale of the suit property to recover the amount is exercise in futility as the assets of the company were admittedly auctioned by the Official Liquidator and distributed among the Creditors.

5. The learned counsel for the revision petitioners would further submit that if the petitioners are forced to contest the petition preferred by the first respondent, they would face irreparable hardship and legal injury. The Court below without considering the above facts erroneously dismissed the application filed by the revision petitioners to reject the plaint. To support his contention, he has relied upon the following decisions:-

(I) AIR1977 SC 282(1)

(ii) AIR 2004 KARNATAKA 370

(iii) (2005) 126 Comp Cas 145 Kar

(iv) (2007) 11 SCC 22

(v) (2006) 4 SCC 457

(vi) AIR 2006 Delhi 317

(vii) AIR 2003 Orissa 30

(viii) 2001 (6) ALT 640

(ix) (1996) Kerala Financial Corpn Vs Official Liquidator (Ker.) 183

6. The learned counsel for the first respondent on the contrary contended that the bar created under Section 446 (1)&(3) of the Indian Companies Act is only for taking legal proceedings against the Company. Whereas the petitioners herein are guarantors and the aforesaid bar will not apply for taking legal proceedings against them. The petition in SFCOP No.89 of 2013 was filed by the first respondent praying for an order against the revision petitioners herein directing them to pay the amount due to SIPCOT, since they are personally liable to pay the amount. As per the sanction letter dated 30.06.1983 and the deed of personal guarantee executed by the petitioners, the liability of the petitioners is made explicit. The above petition in SFCOP No.89 of 2013 is filed under Section 31(1)(aa) of the SFC Act, 1951, against the petitioners herein for enforcing the liability of the sureties and therefore the Official Liquidator is not a necessary party to the proceedings. He would further submit that, the assets of the first respondent's Company was auctioned and confirmed by this Court by the order dated 31.08.2005 and proportionate share from the sale proceeds to a sum of Rs.61,40,000/- was received on 14.09.2006. The right to claim for the

balance arose under the contract of indemnity, only when the sale proceeds were found insufficient. The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963, which corresponds to old Article 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/guarantee would arise when the contract is broken. Therefore, the contract of limitation is to be counted from the date when the assets of the Company were sold on and not when recall notice given. The trial Court has rightly appreciated the above facts and thereby, dismissed the petition filed by the revision petitioners, which calls for no interference.

7. Heard on both sides and records perused.

8. In the present case, the facts not in dispute are as follows:-

(i) this Court vide its order dated 31.03.1997 in CP No.21 of 1992 ordered for winding up of the Company.

(ii) the Official Liquidator had taken over the industrial concern on

21.04.1997 as ordered by the Company Court.

(iii) the first respondent filed SFCOP No.89 of 2013 under Section 31(1)(aa) of the SFC Act 1951 for enforcing the liability of the surety and to determine the liability of the principal borrower.

(iv) the assets of the principal borrower was auctioned for a sum of Rs.1 crore to the highest bidder which was confirmed by the order dated 31.08.2005.

9. Now, the points arose for consideration are as follows:-

> "*(i) Whether the OP filed by the first respondent is maintainable, when the industrial concern does not carry on the whole or substantial part of its business as the Company was winded up as per the order of this Court dated 31.03.1997 in CP No.21/92 and Official Liquidator had taken over the industrial concern on 21.04.1997 as per the order of the Company Court?*
>
> *(ii) Whether the petition is barred under Section 446(1) & (3) of the Indian Companies Act?*
>
> *(iii) Whether the official liquidator is a necessary party in the above petition?*

*(iv) Whether the liability of the petitioners as sureties is co-extensive with that of the principle debtor and therefore they are not liable to pay any amount to the respondents?*

*(v) Whether the OP is time barred?"*

**Point Nos.1 to 5**

10. The petition in SFCOP No.89 of 2019 has been filed by the first respondent under Section 31 (1) (aa) of the State Industrial Finance Act, 1951 to determine the liabilities of the respondents therein and direct to pay amount of Rs.29,49,41,774/- together with interest at the rate of 14.5%. The petitioners herein were Directors of the second respondent's company. The Second respondent's company which was involved in the business of Textile processing and Printing of silk fabrics had availed financial assistance from the first respondent herein for machineries and from third respondent for its working capital exc. However, the business ran into financial difficulties following which the company was wound up on 31.01.1997 under the orders of this Court in C.P.No.21 of 92 and the Official Liquidator, Chennai, was appointed on 31.01.1997 and the affairs of the second respondent was taken

over by the Official Liquidator on 21.04.1997.

11. By referring to the judgements cited above, the learned counsel for the petitioners would contend that since the industrial concern does not carry on the whole or substantial part of his business within the jurisdiction of District Court, Kanchipuram at Chengalpattu on the day of the filing of SFCOP in 2013 as a company was admittedly wound up in 1992 and liquidated in 2015, the SFCOP is not maintainable. He would further submit that without impleading the Official Liquidator the OP is not maintainable.

12. The specific contention the petitioners herein is that, the assets of the second respondent Company was auctioned by the Official Liquidator and an amount of Rs.One Crore was obtained as sale proceeds. The petitioners are given to understand that bothe respondents 1 and 3 lodged their claim for a proportionate share in the amount recovered by the Official Liquidator. As admitted the first respondent received the proportionate share of Rs.61,40,000/- on 14.09.2006. The first respondent having claimed and

received its proportionate share, the second respondent Company, which no longer subsists, stood discharged of the debt. Therefore, the claim of the first respondent that after receiving proportionate share an amount of Rs.29,48,41,774.00/- is due and payable to the second respondent's Company is wholly misconceived and legally untenable. Since on 14.09.2006 itself the claim of the first respondent stood discharged no further claim against the second respondent is legally maintainable. The first respondent being fully aware of the liquidation of the second respondent Company had deliberatedly failed to implead the Official Liquidator as respondent in the petition. The petition has to be rejected on the ground of non joinder of necessary and proper parties. The petitioners herein are only sureties. As per Sections 128 and 134 of the Contract Act, the liability of surety is co extensive with that of the principal debtor and if the principal debtor is released the surety also discharged from the contract. The petitioners and the second respondent were impleaded as sureties and the principal debtor resepctively in OA 467 of 1997 filed by the Indian Overseas Bank Indira Nagar Branch, Chennai-20 before the DRT Chennai and the first respondent herein was impleaded as 9th respondent in the said O.A. The DRT had adjudicated the matter and the said fact is suppressed by the first respondent. Further the main petition being time barred from the admitted date of their foreclosure of the account on 09.11.1992 and their failure in furnishing any details of the mortgage and hypothecated for sale, their prayer seeking direction for sale of schedule mentioned property for recovery of the amount is exercise in futility as the assets of the company were auctioned by the Official Liquidator and distributed amount the creditors.

13. It is not in dispute that in Company Petition No.21/92 the Company Court order for winding up of the company on 31.01.1997 and also appointed Official Liquidator to manage the affairs of the Company. Though the petitioners would contend that without obtaining a permission from the Company Court as contemplated under Section 446(1) and (3) of Indian Companies Act and without adding the Official Liquidator as a party, the OP is not maintainable, the bar created under Section 446(1) and (3) of the Indian Companies Act is only for taking legal proceedings against the

company. The revision petitioners herein are only the guarantors and aforesaid bar will not apply for taking legal proceedings against the petitioners.

14. It is also not in dispute that the assets of the second respondent's Company was auctioned by the Official Liquidator for Rs.One Crore and the first respondent herein has received the proportionate share of Rs.61,40,000/- on 14.09.2006. At present, the first respondent has filed the OP for enforcing the liabilities against the petitioners who are the guarantors. So, it is necessary to get permission of the Company Court under Section 446 (1) and (3) of Indian Companies Act. The suit could have in any case proceeded against the guarantors. Since the Company has been wound up, the proceedings against the guarantors is well in order and maintainable. The contention of the petitioners that since the first respondent has received the proportionate share of Rs.61,40,000/-, it has to be presumed that the second respondent's Company, who is the Principal Debtor was discharged from its liabilities and that being so, the first respondent is not entitled to proceed against the

guarantors. In this case, the Principal Debtor was not discharged from its liabilities. Therefore, the proceedings against the guarantors is maintainable. The cases cited on the side of the petitioners in this regard is not applicable to the present case on hand. In the cited case law, the suit against the principal debtor was abated, since the principal debtor died during the pendency of the suit. Therefore, the suit was dismissed as abated in respect of the principal debtor as well as against the surety. The trial Court has rightly made reference to the decision made in Orissa State Financial Corporation Vs Ramesh Chandra Bebera and another reported in AIR 2003 Orissa 30, wherein the Hon'ble High Court of Orissa in para 6 of the Judgment has held as follows:-

> *"6.Law is no more res integra that, the liability of a surety is co-extensive with that of the principal debtor and a decree can be executed either against the principal debtor or the surety, at the discretion of the creditor. However, where the surety is made to discharge such liability of the principal debtor, such surety has got a right to be reimbursed by the principal debtor. Section 31 of the Act, quoted supra,*

> *contemplates several reliefs which can be granted on the basis of an application of a Financial Corporation. Clause (a) of Section 31(1) deals with the question of sale of property mortgaged, which does not preclude the Court to decide the liability of the principal debtor. In view of the amended provision of Section 31, incorporated by the Amendment Act of 1985, there cannot be any iota of doubt that Section 31 can also be invoked for enforcing the liability of a surety."*

15. The further contention of the petitioners is that the said OP filed under Section 31 of State Financial Corporation Act ought to have been filed within the period of three years as per Article 137 of the Limitation Act, 1963. In this case, admittedly the assets of the second respondent's Company were auctioned by the Official Liquidator and the same was confirmed on 31.08.2005 and the first respondent received the proportionate share of Rs.61,41,000/- from the Official Liquidator on 14.09.2006 and the OP filed on 13.03.2013 which is within three years from the date of breach of contract. The period of limitation is to be counted from the date when the assets of the Company were sold and not when the Recall Notice was given (Ref: Deepak

Bhandari Vs Himachal Pradesh State Industrial Development Corporation Limited, 2014 (5) CTC 791). Therefore, the right to sue on a contract of indemnity/guarantee arose only after the assets were sold and when the contract is broken as per Article 55 of the Limitation Act, 1963. Moreover, the question of limitation is mixed question of law and fact, which can be decided only at the time of trial after recording of evidence. Therefore, the plaint cannot be rejected at the threshold on the question of limitation. Since the above OP has been filed directing the petitioners herein to pay the petition mentioned amount, there is no necessity to implead the Official Liquidator as necessary/proper party. The liability of the petitioners is made explicit in document of guarantee dated 13.03.1990. According to the first respondent, the right to claim the balance arose under the contract of indemnity, since the sale proceeds were found insufficient. Therefore, the respondents were constrained to initiate the proceedings against the petitioners. Therefore, no infirmity or perversity found in the order passed by the learned Principal District Judge, Chengalpattu. Accordingly, the above points are answered in favour of the first respondent.

16. In the result, this Civil Revision Petition is dismissed and the order passed in I.A.No.630 of 2013 in SFC OP No.89 of 2013 dated 08.07.2023 by the learned Principal District Judge, Kancheepuraam, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

15**.09.2023**

Index : Yes/No
Internet : Yes
vsn/cp

To

The Principal District Judge,
Kancheepuraam.

**K.GOVINDARAJAN THILAKAVADI**

vsn/cp

Pre-deliver order made in
**CRP (PD) No.180 of 2016**

15.09.2023