

Union Bank of India

Vs

Manku Narayana

Civil Appeal No. 298 of 1982

(G. L. Oza, V. Khalid JJ)

01.04.1987

JUDGMENT

V. KHALID, J. -

1. The Union Bank of India is the appellant. This appeal is directed against the order passed by a learned Single Judge of the Andhra Pradesh High Court in Civil Revision Petition No. 1743 of 1979, directing the appellant to exhaust the remedies available in law, against the mortgaged property and the principal debtor in execution of a decree obtained by it, before proceeding to execute the same against the guarantor.
2. The appellant filed a suit, No. 87 of 1974, against the principal debtor and the guarantors, one of them being the respondent, for recovery of a sum of Rs. 5,626.70. The principal debtor had borrowed a sum of Rs. 5,100 from the bank on October 21, 1970, on the strength of the guarantee executed by the respondent and the principal debtor. By the said guarantee the respondent undertook to repay the sum independently.. The principal debtor and others had executed a registered simple mortgage deed dated October 16, 1970, in favour of the bank creating a mortgage in respect of their joint family property in order to secure due payment of a sum of Rs. 2,300 out of the loan amount of Rs. 5,100. Since the amount remained unpaid, suit was filed by the bank for recovery of the amount. A decree was passed against the defendants including the respondent, making them personally liable for the decreed amount and also declaring that the amount due to the bank on the mortgage mentioned in the plaint shall be the sum of Rs. 3,092.25. The bank sought the execution of the decree against the respondent-guarantor. Execution was resisted with the plea that the bank should proceed first against the mortgaged property and the principal debtor and that it could proceed against the guarantor only after those steps were exhausted. A preliminary objection was also taken against the execution stating that the decree was partially a decree on mortgage under Order 34 which was preliminary in nature and that it could be executed only after the final decree was passed. The execution court upheld this plea. The bank took the matter in revision before the High Court. The high Court relied upon an earlier decision rendered in similar petition where also the appellant-bank was the decree-holder and held that the appellant had to proceed first against the mortgaged property and the principal debtor and then only against the guarantor. This appeal by special leave is directed against the said order.
3. The learned counsel for the appellant placed strong reliance upon a decision of this court in Bank of Bihar v. Damodar Prasad ((1969) 1 SCR 620 : AIR 1969 SC 297 : 39 Com Cas 133), in support of his contention that it was not necessary to exhaust the remedies of a decree-holder against the principal debtor before proceeding against a guarantor or a surety. In that case this court was considering the correctness of a direction to the creditor to enforce his decree against the surety only

after exhausting the remedies against the principal debtor. It was held that in the because of some special equity, the surety had no right to restrain execution against him until the creditor had exhausted his remedies against the principal. This court observed that it would work injustice in some cases if action against the guarantor was postponed till remedies against the principal debtor were exhausted, for in certain cases it might take a long time before the remedied are exhausted. In that case also, the decree-holder was a banking company. This Court observed that the very object of the guarantee would be defeated if the creditor was asked to postpone his remedies against it and that a guarantee being a collateral security, usually taken by banker, would become useless if the rights of the bank or the creditor who took such surety were cut down by a direction in the decree curtailing the right of the decree-holder to process against the surety only after all remedies were exhausted against the principal debtor. This Court, on consideration of the facts of that case, set aside the direction made by the decree that "plaintiff-bank shall be at liberty to enforce its dues in question against defendant 2, only after having exhausted its remedies against defendant 1". The appellant's counsel pleaded before us seeking support from this judgment that the bank could proceed against the guarantor without exhausting the other remedies since the guarantee was an independent one. We have difficulty in accepting his case.

4.The decree in exaction is a composite decree, personally against the defendants including the respondent and also against the mortgaged property. We do not pause to consider whether the two portions of the decree are severable or not We are of the view that since a portion of the decreed amount is covered by the mortgage, the decree-holder bank has to proceed against the mortgaged property first and then proceed against the guarantor. Since the High Court was not told that such steps were taken, we do not think we will be justified in holding that the High Court was in error in making the direction which is under challenge before us. The appeal, under these circumstances, has, therefore, to be dismissed.

5.however, we are told; by the appellant's counsel that the bank had taken steps against the mortgaged property and also against the principal debtor. We find in clause (H) of the statement of facts in the SLP the following statement :

"The petitioners say that they made an application for sale of the mortgage property but there was no offer for purchase of the mortgaged property. The petitioners also filed an execution application against the respondent for execution of the said decree by committing the respondent to civil prison. Respondent 1 filed a revision application being Civil Revision Application No. 1472 of 1979 against the order of the Court of District Munsiff, Gajapatinagaram, dated February 17, 1979, passed in Execution Application No. 45 of 1978 filed by the petitioners.

6. From this it is evident that the decree-holder had proceeded against the mortgaged property and also against the principal debtor. If this is correct, execution against the guarantor was maintainable. In view of this disclosure, we remind the matter to the High Court giving opportunity to the appellant to plead this case before the High Court and seek execution of the decree against the respondent with liberty to the respondent to dispute the correctness of this statement. The High Court will dispose of the matter in accordance with law. No order as to costs.

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