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Court : Orissa

Decided On : Nov-10-2008

Reported in : AIR2009Ori99

Judge : B.S. Chauhan, C.J. and; B.N. Mahapatra, J.

Appellant : Krushna Chandra Mallick

Respondent : Chief General Manager, State Bank of India and ors.

Advocate for Pet/Ap. : Mr. Kar

Judgement :

B.S. Chauhan, C.J.

1. This writ petition has been filed challenging the impugned notice dated 29-9-2008 wherein the petitioner has been shown as one of three guarantors for one principal borrower Kuntala Nayak. There is a judgment and decree of the Debts Recovery Tribunal (hereinafter called 'the Tribunal') providing for the joint and severe liability of all the three guarantors with the principal borrower. Petitioner apprehends that his property shall also be put to auction without touching the properties of other two guarantors who are family members of the borrower.

2. Mr. Tuna Sahu, who generally appears for the State Bank of India though has no instruction in this case, has assisted the Court on our request.
3. Mr. Tuna Sahu, learned Counsel for the bank has raised preliminary objection regarding the maintainability of the writ petition making a reference to the proviso to Order 1, Rule 9 of the Code of Civil Procedure, that the Tribunal has not been impleaded as a party, non-joinder of necessary party is always fatal. For that purpose, he has placed reliance on a judgment of nearly the Constitution Bench of the Supreme Court in the case of Udit Narain Singh Malpaharia v. Member, Board of Revenue, Bihar and Anr. : AIR 1963 SC 786; wherein the Court held that Tribunal is a necessary party and its non-impleadment is fatal. Mr. Tuna Sahu further submitted that if a petition is filed against the order of the Court, the Court is not to be impleaded. Vide Savitri Devi v. District Judge, Gorakhpur and Ors. : AIR 1999 SC 976.
4. At this juncture, Mr. Kar, learned Counsel for the petitioner made a request to the Court that he may be permitted to implead the Tribunal as a party and it is submitted that such a request can be made at any stage of the proceeding including that of the appeal before the higher Court as laid down by the Supreme Court in Bal Niketan Nursery School v. Kesari Prasad : AIR 1987 SC 1970. Even otherwise, the Court can direct for impleadment of the necessary party suo motu.
5. Considering the submissions made by Shri Kar, the Tribunal, is impleaded as opposite party No. 5. Learned Counsel for the petitioner is permitted to make necessary corrections in the Cause Title.
6. Mr. Kar has submitted that petitioner cannot be fastened with the liability unless the recovery is made from the borrower or other guarantors, who are his family members. In view of the provisions of Section 146 of the Contract Act, if there is more than one guarantor, the liability has to be shared equally. Secondly, it is pointed out making reference to Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 that before putting the property to auction the Authority has to apply its mind and take a decision as to what extent, the property of the principal borrower or of the guarantor and if there are more than one guarantor as of which guarantor is to be put to auction. The said Sub-rule (5) of Rule 8 provides that in

case sale of the part of the property can satisfy the decree, the entire property should not be put to auction. Thirdly, when there is no valuation report, the authority should not be permitted to proceed for auction. The valuation report of the property must be properly made and petitioner be given an opportunity to file objection in respect of the valuation thereof.

7. Mr. Tuna Sahu has submitted that liability of the guarantor is to co-extensive of the borrower. Legal issues are being made for the first time here ought to have been raised before the Tribunal and this Court should not enter into the adjudication of factual controversies. So far as the issue regarding valuation and filing objection by the petitioner are concerned, these are premature at this stage for the simple reason that authorities had not taken any decision as to which property is to be put to auction for recovery and as to whether the entire property is to be sold or part thereof.

8. We have considered the rival submissions made by the parties and perused the record.

9. This Court while deciding the Writ Petition (C) No. 16616 of 2007 (Sri Sarat Chandra Acharya v. Bank of India, Bhubaneswar and 2 Ors.), vide its judgment and order dated 23-9-2008 held that liability under Section 128 of the Contract Act is co-extensive to that of the borrower. While deciding the said case reliance had been placed upon the judgments of the Hon'ble; Supreme Court in Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr. : AIR 1969 SC 297; State Bank of India v. Saksaria Sugar Mills Ltd. and Ors. : AIR 1986 SC 868; State Bank of India v. Indexport Registered and Ors. : AIR 1992 SC 1740; and judgment of this Court in Sukar Pradhan and Ors. v. Orissa State Financial Corporation and Ors. AIR 1992 Orr 281, in which a large number of judgments running from 1917 to 1992 had been considered.

10. Section 146 of the Contract Act provides that co-sureties are liable to pay each an equal share of the whole debt, which reads as under:

146. Co-sureties liable to contribute equally.-

Where two more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

11. However, so far as the petitioner's averments in respect of Section 146 of the Contract Act and Rule 8(5) of the Rule, 2002 are concerned, the same have to be argued before the appropriate forum and the forum is required to adjudicate upon it.

12. Considering the submissions made by the learned Counsel for the parties, we dispose of the writ petition that in case the petitioner files a proper representation before the Tribunal ventilating all legal and factual issues, regarding the application of the provisions of Section 146 of Contract Act and Rule 8(5) of the Rules, 2002, we request the learned Tribunal to dispose of the same expeditiously after giving an opportunity of hearing to the parties concerned.

13. If any application for interim relief is filed, the same may also be disposed of as early as possible.

B.N. Mahapatra, J.

14. I agree.

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