PETITIONER:
STATE BANK OF INDIA

Vs.

RESPONDENT:
INDEXPORT REGISTERED AND ORS.

DATE OF JUDGMENT30/04/1992

BENCH:
YOGESHWAR DAYAL (J)
BENCH:
YOGESHWAR DAYAL (J)
RANGNATHAN, S.
RAMASWAMI, V. (J) II

CITATION:
1992 AIR 1740 1992 SCR (2)1031
1992 SCC (3) 159 JT 1992 (4) 273
1992 SCALE (1)1109

ACT:
Civil Procedure Code, 1908:
Order 21, Rules 30, 46, 46A, 46B, 46F, 50, 72A and Order 34, Rules 4 and 5 and Sections 47 and 151-Execution of Composite decree comprising a money decree personally against all defendants-judgment debtors, and also a mortgage decree against one of the partners in respect of shop mortgaged by him-Whether decree-holder can execute the decree first against the guarantor without proceeding against the mortgaged property-Whether guarantor can be sued without even suing the principal debtor-Guarantor's liability-Whether co-extensive with that of principal debtor-Whether executing court can go beyond the decree-Contract Act, 1872 : Section 128.

HEADNOTE:
The appellant-Bank had granted a Packing Credit facility to the extent of Rupees one lakh to the Respondent No. 1 - Firm, consisting of Respondent No. 2 and the deceased son of Respondent No. 3. Respondent No. 2 had created an equitable mortgage of his shop as security and Respondent No. 4, father of the deceased partner, had executed a Deed of Guarantee in favour of the appellant-Bank.

The appellant-Bank filed a suit against the respondents including Respondent No. 3 who was impleaded in place of her deceased son, for a money decree and also for a preliminary decree against Respondent No. 2, and for a direction that if he committed default, a final decree be passed against him, with permission to the appellant to apply for a personal decree against him for any deficiency after the sale of the mortgaged property. The suit was decreed by the trial court.

No appeal was filed by the Respondent No. 4 - Guarantor, and the decree became final. At the time of execution of the decree Respondent No. 4 objected to it on the ground that since no steps were taken against the mortgaged property i.e. shop, no action by way of execution could be taken

for proceeding against the guarantor till the mortgaged shop was sold and only if the realisation from the sale of the shop was deficient, then the balance could be recovered from the judgment-debtors personally.

The Additional District Judge held that since it was a composite decree, and the mortgaged property was also involved, the decree-holder should have proceeded first against the mortgaged shop and, since it had not done so, the execution application against the objector (guarantor) did not lie. The appellant-decree-holder challenged this decision before the High Court which also dismissed the revision petition. Hence the appeal by the decree- holder.

Allowing the Appeal, this Court,

HELD : 1. The decree is a money decree against all the defendants-respondents and a mortgage decree only against defendant-respondent No. 2 so far as the shop is concerned. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. There is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months. The decree is not in the prescribed Form No. 5 of Appendix 'D' to the Code of Civil Procedure. The decree does not postpone the execution. It is simultaneous and is jointly and severally against all the defendants-respondents, including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. There is nothing in law which provides a composite decree to be first executed only against the property. [1037 C-E, 1038 E]

1.2 The decree for money is a simple decree against the judgment-debtors, including the guarantor and in no way subject to the execution of the mortgage decree against the judgment debtor No. 2-Respondent No. 2. If, on principle, a guarantor could be sued without even suing the principal-debtor there is no reason, even if the decretal amount is covered by the mortgage decree to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor.

[1040 H, 1041 A]

1.3 If the composite decree is a decree which is both a personal

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decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. For a simple mortgage decree as prescribed in Form No. 5 of Appendix 'D' of the Code of Civil Procedure it could be so because the decree provides like that. It is only when the sum realised on sale of the mortgaged property is insufficient then the judgment-debtor can be proceeded with personally. [1041 C-D]

Union Bank of India v. Manku Narayana, AIR 1987 SC 1078, differed.

Bank of Bihar Ltd. v. Damodar Prasad & Anr., [1989] 1 SCR 620, relied on.

The Hukumchand Insurance Co. Ltd. v. The Bank of Baroda

JUDGMENT:

v. Shivnarayan Bhagirath & Ors., AIR 1940 Bombay, 247 and Muthuvelappa Goundan & Anr. v. Palaniapa Chettiar & Ors.

1937 Madras Weekly Reports 373, approved.

Raja Raghunandan Prasad Singh & Anr. v. Raja Kirtyanand Singh Bahadur, AIR 1932 P.C. 131, distinguished.

Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition. p 728; Chitty on Contracts 24th Edition Volume 2, p. 1031, paragraph 4831 & Halsbury's Laws of England Fourth Edition paragraph 159 p. 87, referred to.

In the instant case, the guarantor never took any plea in the suit to the effect that his liability is only contingent if remedies against the principal debtors fail to satisfy the dues of the decree-holder. If such a plea had been taken and the court trying the suit had considered the plea and gave and finding in favour of the guarantor, then it would have been a different position. But on the face of the decree, which has become final, the court cannot construe it otherwise than its tenor. No executing court can go beyond the decree. All such pleas as to the rights which the guarantor had, had to be taken during trial and not after the decree while execution is being levied. [1042 G, 1043 A]

1.5 The orders of the High Court and of the Additional District Judge

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are set aside. The decree-holder is entitled to proceed against the guarantor (judgment-debtor No. 4) for the execution of the decree in question. [1043 B]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1888 of 1992.

From the Judgment and Order dated 23.5.1990 of the Delhi High Court in Civil Revision No. 587 of 1989.

G. Ramaswamy, Harish N. Salve, Rajiv Kapur and R.P. Kapur for the Appellants.

J.C. Batra, Vijay Kumar, H. Chawla, S. Prasad and Ms. Sangeeta Aggarwal for the Respondents

The Judgment of the Court was delivered by

YOGESHWAR DAYAL, J. Special leave granted.

This appeal is directed against the judgment of the High Court of Delhi dated 23rd April, 1990 whereby the High Court was pleased to dismiss the revision petition filed by the appellant-Bank against the judgment of the Additional District Judge, Delhi dated 5th May, 1989 whereby the Additional District Judge, Delhi, relying upon the decision of this Court in Union Bank of India v. Manku Narayana, AIR 1987 SC 1078, dismissed the Execution Application No. 39 of 1985 against respondent No 4 (judgment debtor-Guarantor).

The question involved in the appeal really is whether the said decision is correct. In Manku Narayana's case (supra) this Court took the view that:

> "The decree in execution 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

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holding that the High Court was in error in making the direction which is under challenge before us."

Before we go into the question of the correctness or otherwise of the aforesaid decision a few facts of the present case may be noticed.

The appellant, one of the Nationalised Banks, is a decree-holder. M/s. Indexport Registered, respondent no. 1, is a partner firm. Shri Janeshwar Kumar Jain, respondent No. 2, was a partner of respondent No. 1 along with one Shri Ajay Kishan Mehta (since deceased and now represented by his mother Smt. Savitiri Devi, respondent No. 3). Shri Ram Kishan, respondent No. 4, is a guarantor.

The appellant-Bank had granted to respondent No. 1 a Packing Credit Facility to the extent of Rs. 1,00,000 and respondent No. 4 had executed a Deed of Guarantee in favour of the appellant-Bank. Shri Ajay Kishan Mehta, having died prior to the filing of the suit, Smt. Savitiri Devi, was impleaded in place of her deceased son as his legal representative. As a security, respondent No. 2, had also created an equitable mortgage of his shop situated in Rori Bazar, Sirsa, Haryana, in favour of the appellant.

The appellant was obliged to file a suit against the respondents for a money decree for Rs. 33,705.22. The appellant also prayed for a preliminary decree against the respondent No. 2 with a direction that if he commits a default in payments, a final decree be passed against him with permission to the appellant to apply for a personal decree against him for any deficiency after the sale of the mortgaged property. The suit was contested by the respondents. In paragraph 12 of its judgment, while deciding issue No. 7 relating to the relief, the learned trial court observed as under:-

"12. In view of my findings recorded above, the present suit succeeds and decreeing the same, i hereby pass a decree in favour of the plaintiff for recovery of Rs. 33,705.22p. with costs. The defendants shall pay future interest at the rate of 7% per annum (as agreed in the letter Ex. PAPW 5/4) from the date of the institution of the suit till its realisation. The plaintiff Bank shall also be entitled to the amount by way of sale of the shop in case the decretal amount is not paid within a period of three

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months from today, decree in question will also be deemed to be a personal decree against all the defendants, but, however, decree will be executable against defendant No. 3 qua the estate inherited by her from Ajay Kishan Mehta. Decree-sheet be prepared and the file be consigned to the record room."

On an application of the appellant-Bank the execution of the decree was transferred to Delhi and on notice being issued by the Court of the Additional District Judge, Delhi guarantor-respondent No. 4 filed objections. The main objection was that no steps were taken against the mortgaged property i.e. shop and no action by way of execution could be taken for proceeding against the guarantor till the mortgaged shop is sold and it is only if the realisation from the sale of the shop is deficient that the balance could be recovered from the judgment debtors personally.

The Additional District Judge, Delhi, following the decision of this Court in Manku Narayana's case (supra) took the view that it is a composite decree, personally against the principal debtor and the guarantor and also against the

mortgaged property of defendent No. 2, and therefore, since it is a composite decree and the mortgaged property is also involved, the decree-holder should have proceeded first against the mortgaged shop and since it has not done so, the execution application against the objector (guarantor) does not lie. The decree-holder challenged this decision dated 5.5.1989 by way of a revision petition before the High Court and the High Court also, following the decision of this Court in Manku Narayana's case (supra), dismissed the revision petition and it is against this decision that the present appeal arises.

It will be noticed that the loan was taken by the firm, namely, respondent No. 1, which consisted of Sh. Dhaneshwar Kumar Jain, respondent No. 2 (defendant No.2) and Sh. Ajay Kishan Mehta (since deceased). The respondent No. 2 (defendent No. 2) had created an equitable mortgage of his shop and respondent No.4, who is a father of late Sh. Ajay Kishan Mehta stood guarantor for the loan to respondent No. 1. The very wordings of the decree quoted above shows that it is a personal decree against all the defendants/judgment-debtors. Respondent No. 4 was defendant No. 4, so it is a money decree against defendant No. 4 as well. It is also a mortgage decree against the mortgagor, namely-defendant No. 2

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only. The decree specifically mentions that a money decree is being passed for recovery of Rs. 33,705.22 with costs and the defendants shall pay interest @ 7% per annum from the date of the institution of the suit till its realisation. There is also a decree passed in favour of the Bank entitling it to sell the shop in case decretal amount is not paid within three months from the date of the decree and the decree specifically mentions that it will be deemed to be a personal decree against all the defendants (respondents). Only qua defendant No. 3 it can be executed only to the extent the mother inherited the estate of her son Shri Ajay Kishan Mehta. It is thus clear from the decree that it is a money decree against all the defendants (respondents) and a mortgage decree only against defendent No. 2 (respondent No. 2) so far as the shop in concerned. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months. The decree is not in the prescribed form No. 5 of Appendix 'D' to the Code of Civil Procedure.

In Bank of Bihar Ltd. v. Damodar Prasad and another, [1969] 1 SCR 620 the facts were that the plaintiff Bank lent money to Damodar Prasad, defendant No. 1, on the guarantee of Paras Nath Sinha, defendant No. 2. On the date of the suit Damodar Prasad was indebted to the Bank for Rs. 11,723.56 on account of principal and Rs. 2,769.37 on account of interest. In spite of demands neither the principal debtor nor the guarantor paid the dues. The plaintiff Bank then filed a suit claiming a decree for the

amount due. The trial court decreed the suit against both the defendants but while passing the decree the trial court directed that the plaintiff Bank shall be at liberty to enforce its dues against defendant No. 2 only after having exhausted its remedies against defendant No. 1. The plaintiff went in appeal challenging the legality and propriety of this direction. The High

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Court dismissed the appeal, whereupon on certificate, the matter came before this Court. Bachawat, J. speaking for the Court held that the direction must be set aside. It was observed that:

> "It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

The Court further held that such directions are neither justified under Order XX rule 11(1) or under the inherent powers of the Court under Section 151 of the code of Civil Procedure to direct postponement of the execution of the decree.

In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract".

In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus :

> "Co-extensive-Surety's liability is co-extensive with that of the principal debtor.
> A surety's liability to pay the debt is not removed by reason of the creditor's ommission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

In Chitty on Contracts 24th Edition Volume 2 at page 1031 paragraph 4831 it is stated as under:-

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> "Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

In Halsbury's Laws of England Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."

In The Hukumchand Insurance Co. Ltd. v. The Bank of Baroda and others, AIR [1977] Karnataka 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship

then was) observed:-

> "The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default.

In Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath and others, AIR [1940] Bombay 247, a Division Bench of the Bombay High Court (Kania and Wassoodew JJ.) held that the liability of the surety is co-extensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors.

In Muthuvelappa Goundan and another v. Palaniapa Chettiar and other [1937] Madras Weekly Reports 373, the facts were that the plaint combined two claims, one against defendants 1 to 3 and their children on the basis of a promissory note Ex. A executed by defendants 1 to 3 and

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One Kasiappa, deceased, on 29th August, 1931 and the other a claim against Kasiappa's sons (defendants 4 and 5) not merely on the promissory note but also on a security bond Ex. B executed by Kasiappa on 17th April, 1932 in respect of the amount due under Ex. A. The suit was decreed. An appeal was filed by defendants 1 to 3 against certain directions contained in the decree of the lower court as to manner in which the decree is to be executed. The Subordinate Judge had to consider the contention put forward on behalf of Kasiappa's sons that the properties covered by Ex. B should be sold only after the plaintiff had exhausted his remedies against defendants 1 to 3 and their family properties. The defendants 1 to 3 contended to the contrary. The trial court directed that the plaintiff should bring the secured properties to sale after exhausting the personal remedy against the defendants, meaning the remedy personally against defendants 1 to 3, and also the remedy against the family property of all the defendants. The appeal was filed by defendants 1 to 3 before the High court. It was contended on behalf of the appellants that the lower court should have directed the plaintiff to proceed in the first instance against the security properties and only after they had been sold should the plaintiff have been permitted to proceed against the appellants personally. This contention was sought to be supported before the High Court by the analogy of a decree to be passed in mortgage suits. It was pleaded that provisions of Section 68 of the Transfer of Property Act should be applied as the remedy in respect of charge is governed by it. It was also urged on behalf of the appellants that on the true construction of Section 68, the course contended for by him would be the proper course. This contention of the appellants was negatived by the High Court. The High Court observed that this can apply only as between the mortgagor and the mortgagee and the appellants had nothing whatever to do with the security bond. The

relationship of the appellants was not of the mortgagor at all, and, therefore, Section 68 could not be invoked.

It will be noticed that in present case no appeal was filed by the gurantor against the passing of the decree and the decree has become final.

The decree for money is a simple decree against the judgment debtors including the guarantor and in no way subject to the execution of the mortgage decree against the judgment debtor No. 2. If on principle a

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guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It appears the above quoted observations in Manku Narayana's case (supra) are not based on any established principle of law and/or reasons, and in fact, are contrary to law. It, of course depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. For a simple mortgage decree as prescribed in Form No. 5 of Appendix D of the Code of Civil Procedure it could be so because the decree provides like that. It is only when the sum realised on sale of the mortgaged property is insufficient then the judgment-debtor can be proceeded with personally. But the observations of the court in Manku Narayana's case (supra) that even if the two portions of the decree are severable and merely because a portion of the decretal amount is covered by the mortgage decree, the decree-holder per force has to proceed against the mortgaged property first are not based on any principle of law. With all due respect to the learned Judge, in the light of the observations made by us earlier, we are constrained to observe that Manku Narayana's case (supra) was not correctly decided.

Mr. Batra on behalf of the respondent/guarantor submitted that since the plaintiff/decree-holder chose to file the suit at Sirsa only with a view that the mortgage property is situated there, he should, therefore, take recourse to the execution of the mortgage decree alone in the first instance. It will be noticed that we are dealing with the matter at the execution stage and are not concerned with the correctness or otherwise of the decree under execution. Therefore, this submission of the learned counsel has got no basis. Learned counsel for the guarantor then brought to our notice the following decisions:-

Raja Raghunandan Prasad Singh and another v. Raja Kirtyanand Singh Bahadur, AIR [1932] P.C. 131. This case has not applicable to the

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present case as it dealt with the construction of the surety bond furnished during appeal in a decree passed in a mortgage suit.

State of Madhya Pradesh v. Kaluram, AIR [1967] SC 1105. This again has no relevance as it relates to the question when the security gets discharged.

The Bank of Bihar v. The State of Bihar and others, AIR [1971] SC 1210. This was a case of pledge of the goods and, therefore, has no relevance to the facts of present

case.

Look Karan Sethia etc. v. Ivan E. John and others etc., [1977] 1 SCR 853 at 871. This again was a case relating to dissolution of partnership and for rendition of accounts.

The State Bank of Saurashtra v. Chitranjan Rangnath Raja and another, AIR [1980] SC 1528. It will be noticed that in this case plea was taken in the suit and the matter was not relating to the execution of the decree.

State Bank of India v. M/s. Saksaria Sugar Mills Ltd. and others, AIR [1986] SC 868. In this case even when the sugar Mills were taken over it was held that the Bank's rights as secured creditors and their remedies are not affected.

Deep Chand v. Punjab National Bank and another, 1 [1990] BC 50. This case again is relating to the interpretation of the decree and has no relevance to the facts of the present case.

Kumar Sudhendu Narain Deb v. Renuka Biswas (Mrs.) and others. This again has no application to the question posed before us.

The guarantor in the present suit never took any plea to the effect that his liability is only contingent if remedies against the principle debtor fail to satisfy the dues of the decree-holder. If such a plea had been taken and the court trying the suit had considered the plea and gave any finding in favour of the guarantor, then it would have been a different position. But in the present case, on the face of the decree, which has become final, the court cannot construe it otherwise than its tenor. No. executing court can go beyond the decree. All such pleas as to the rights which the

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guarantor had, had to be taken during trial and not after the decree while execution is being levied.

The result is that the appeal is allowed and the impugned orders of the High Court dated 23rd May, 1990 and of the learned Additional District Judge dated 5th May, 1989 are set aside and it is held that the decree-holder is entitled to proceed against the guarantor (judgment debtor No. 4) for the execution of the aforesaid decree.)

It appears that in pursuance of the orders of this Court dated 19th February, 1990 respondent No. 4 has furnished a bank guarantee in favour of the appellant-bank to the extent of Rs. 70,000. In view of the result of the appeal, the decree-holder bank will be entitled to proceed against judgment-debtor No. 4 to the extent of the decretal amount recoverable from the bank guarantee furnished by him and also to proceed in execution in accordance with law for the balance amount, if any.

N.P.V. Appeal Allowed.

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