

(2006) 08 AP CK 0015
Andhra Pradesh High Court
Case No: CRP No. 6799 of 2005

M.G. Brothers Finance Ltd.

APPELLANT

Vs

J. Badarinath and Others

RESPONDENT

Date of Decision: Aug. 21, 2006

Acts Referred:

- Contract Act, 1872 - Section 128, 43, 44

Citation: (2007) 1 ALD 451

Hon'ble Judges: C.Y. Somayajulu, J

Bench: Single Bench

Advocate: J. Narayana Swamy, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

C.Y. Somayajulu, J.

Revision petitioner obtained a decree for payment of money against respondents and filed E.P. No. 74 of 2001 for recovery of the amount due under the said decree and realized some amounts from respondents 2, 3, 5, 6 and 7 for which part satisfaction was recorded and that E.P. was closed. Thereafter, revision petitioner filed E.P. No. 90 of 2004 for recovery of the balance amount due under the decree by way of attachment of the salary of the fourth respondent. Fourth respondent filed his counter contending that inasmuch as joint liability is different from joint and several liability, and since the decree holder cannot divide the amount due under a decree obtained by him against several persons and recover those portions from the judgment-debtors as per his choice and since the decree holder chose to proceed against the other respondents earlier, it cannot, subsequently, seek attachment of his salary, when the other respondents against whom it chose to proceed against earlier have the capacity to discharge the amount due to it under the decree.

2. No oral or documentary evidence was adduced by the parties. The Executing Court by relying on K.S.R. Murthy v. M/s. S.R. Chit Funds Pvt. Ltd. and Anr. 2002 Suppl. (1) ALD 215: 2001 (3) LS 453 and [G. Laxmaiah Vs. State Bank of Hyderabad and Another](#) , dismissed the E.P. on the ground that the revision petitioner, who chose to proceed against the respondents 2, 3, 5, 6 and 7 earlier, has to proceed against them only for recovery of balance but cannot proceed against fourth respondent half-way, for realization of the decretal amount. It further observed that inasmuch as the revision petitioner failed to produce the salary certificate of the fourth respondent with full particulars, and as the salary certificate produced by the fourth respondent shows that from out of the salary and other emoluments amounting to Rs. 11,203.27ps., there are deductions to a tune of Rs.9,970.27ps., the exact amount attachable cannot be determined and dismissed the E.P. Hence, this revision.

3. The main contention of the learned Counsel for revision petitioner is that inasmuch as the apex Court in [State Bank of India Vs. Messrs. Indexport Registered and others](#) , clearly held that the decree holder has a right to proceed against any of the judgment-debtors including the guarantor, in the first instance, in view of Section 128 of the Contract Act, 1872 (the Act), which lays down that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract, and since the decree does not put any embargo on the right of the revision petitioner to proceed against any of the judgment-debtors of his choice, the executing Court was in error in holding that the decree holder should proceed against such of those judgment-debtors against whom he had earlier proceeded and cannot proceed against the fourth respondent and since the decisions relied on by the executing Court for refusing the relief sought by the decree holder is contrary to the decision of the apex Court in M/s. Indexport Registered"s case (supra), the order under revision is not sustainable.

4. Though served fourth respondent did not put in appearance either through Counsel or in person.

5. The operative portion of the decree reads--

that the defendants do pay to the plaintiff a sum of Rs. 1,21,225-00 with future interest at the contractual rate of 12% p.a. on a principal sum of Rs. 1,10,000-00 from the date of the suit i.e., 19-1-1999 till its realization; and....

So, it is clear that the decree is a joint decree and it does not place any fetter on the right of the decree holder to proceed against any of the judgment-debtor of its choice for recovery of the amount due thereunder.

6. As per Section 43 of the Contract Act if two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. The right of such joint promisor, against whom the promisee proceeded against, is to compel

every other joint promisor to contribute equally with himself for the performance of the promise, unless a contrary intention appears from the contract, and if any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares, and the surety can recover, from his principal, the payments made by him on behalf of the principal debtor on account of the debt incurred by the principal debtor. As per Section 44 of the Contract Act, when two or more persons made a joint promise, release of one of joint promisors by the promisee, does not discharge the other joint promisor or joint promisors, and the joint promisor so released would not be freed from his responsibility to the other joint promisor or joint promisors. In view thereof, the decree holder has a right to proceed against any of the judgment-debtors of its choice for recovery of the amount due to it under the decree.

7. The two decisions relied on by the executing Court did not consider the effect of Sections 43 and 44 of the Act or the ratio in the decision of the Apex Court in *M/s. Indexport Registered*'s case (supra), that the decree holder is entitled to proceed against the guarantor for execution of the decree in the first instance without proceeding against the principal debtor. When the law in force and the decree do not lay down any fetters on the right of the decree holder to proceed against any of the judgment-debtors for recovery of the amount due under the decree from any of the judgment-debtors of his choice, it is not for the Court to state what amount the decree holder should realize from which of the judgment-debtors under the decree. It is for the decree holder to decide what amount he should recover from which judgment-debtor. Therefore, in my considered opinion, the executing Court was in error in dismissing the E.P. on the ground that the revision petitioner, who earlier had proceeded against the other judgment-debtors, has to proceed against them only but cannot proceed against the fourth respondent, because revision petitioner, as decree holder, has absolute right to proceed against any or all the judgment-debtors. No judgment-debtor has a right to say that he is not bound by the decree. His right is only to claim contribution from the other judgment-debtors if they happen to be co-sureties. If he happens to be a guarantor, his right is to proceed against the principal debtor for the recovery of the amount paid by him to the decree holder.

8. When a decree holder file an E.P., for attachment of the salary of the judgment-debtor, the executing Court has to call for the salary particulars of the judgment-debtor from his employer. As rightly observed by the executing Court, in the order under revision, not all amounts which are deducted from the salary of the fourth respondent can be taken into consideration for arriving at the amount that has to be attached. The executing Court was in error in taking into consideration a document produced by the 4th judgment-debtor which is not marked as an exhibit for deciding the petition.

9. Therefore, the revision petition is allowed with costs. The executing Court shall issue notice to the employer of the fourth judgment-debtor (4th respondent) to send his salary particulars and the deductions being made therefrom and then arrive at the amount that is liable for attachment from out of his salary as per law.