

**IN THE COURT OF 2ND ADDL. SENIOR CIVIL JUDGE,
BHUBANESWAR, DISTRICT-KHURDA.**

PRESENT:- **Shri S.K. Pattanaik, M.A., LL.,M,**
2nd Addl. Senior Civil Judge, Bhubaneswar.

M.S. NO. 36/90 of 2010/2007

Oriental Bank of Commerce,
A body corporate under the banking companies
(Acquisition and Transfer of Undertaking Act, 1980),
(Act 40 of 1980) having its head office at
Harsha Bhawan, E-Connought place,
New Delhi-110001, and carrying on Banking Business
amongst other places at its Branch at Saheed Nagar,
Bhubaneswar represented through its Chief Manager.

..... Plaintiff

-Versus-

1. Sk. Mukhatar Ali, aged 44 yrs
S/O. Sk. Mushak Ali,
At/PO-Lemalo, Dist. Cuttack.

2. Tofan Singh, aged about 45 yrs.
S/o. Surendra Singh,
Plot No.755, At/PO. Pathuria,
Dist : Mayurbhanj,
At/Present-As.T.G. Helper,
I.T.P.S. Banharpali, Dist. Jharsugada.

.....Defendants

COUNSELS APPEARED FOR THE PARTIES:

For the Plaintiff : M/s. S.S. Kabi & Associates
For Defendant No.1 : None
For Defendant No.2: M/s. B.K. Mohanty(B) & Associates

DATE OF ARGUMENT: 25.08.2014

DATE OF JUDGMENT: 01.09.2014

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JUDGMENT

This is a suit for realisation of Rs.1,42,721/- (Rupees One lakh forty two thousand seven hundred twenty one).

2. Plaintiff's case in brief is as follows :-

The Defendants approached the plaintiff bank for loan for repairing and renovation of house of defendant No.1. The plaintiff after due consideration of the application made by the defendant No.1 on dated 11.03.2002 sanctioned loan of Rs.1,00,000/- (Rupees One lakh). Accordingly, the defendants executed the documents including the demand promissory note as per the terms and conditions of the Bank. The defendant No.1 also agreed to repay the loan amount in 120 monthly installments of Rs.1,406/- (Rupees One thousand four hundred six) per month as per the interest schedule fixed by the bank. The defendants agreed that the payment of acknowledgement made by them shall be binding on all of them jointly and severally.

It is the further case of the plaintiff that after availing such loan, the defendant No.1 has failed and neglected to repay the said loan as stipulated. In spite of several requests of the plaintiff bank, the defendant No.1 has not paid any amount. Finally, the plaintiff issued a Regd. Letter through its pleader to the Defendants on dated 04.02.2005 but the Defendants did not pay any heed to it. The defendants have also signed debit balance confirmation on dated 31.03.2004 where they have also confirmed and acknowledged the outstanding liabilities. In this process, the plaintiff prayed that both the

defendants are jointly and severally liable to pay the outstanding dues of Rs.1,42,721/- (Rupees One lakh forty two thousand seven hundred twenty one) with interest @ 11.5% per annum from the defendants. Hence, the suit.

3. The Defendant No. 1 has filed written statement and issues are settled on 29.10.2013 but later on he is set exparte vide order dated 14.08.2014. The defendant No.2 contested the suit without filing the written statement.

4. Basing on the pleadings of the parties, following issues are settled:

I S S U E S

- 1) Whether the suit is maintainable in the eye of law?
- 2) Whether there is any cause of action to file the present suit ?
- 3) Whether the Plaintiff is entitled to get recovery for an amount of Rs.1,42,721/- (Rupees One lakh forty two thousand seven hundred twenty one) with PI and FI @ 11.5% per annum?
- 4) Whether the Defendants are liable jointly and severally for that?
- 5) Whether the plaintiff is entitled for any other relief?

6. In order to establish its case, the plaintiff has examined Sri Surendra Nath Parida as P.W.1 and relied upon Exts. 1 to 10 in support of their stand. The defendant No.2 has not filed written statement but only took part in the cross examination.

F I N D I N G S

ISSUE NO.3 & 4 :

7. These issues are interlinked and interdependent to each other and need common evidence for discussion for which these issues have been taken up together. Plaintiff has filed the suit for realisation of an amount of Rs.1,42,721/- (Rupees One lakh forty two thousand seven hundred twenty one) along with P.I. and F.I. @ 11.5% per annum against the Defendants. P.W.1, the Officer of Oriental Bank of Commerce in his evidence has fully corroborated the plaint story as averred. He proves Ext.1, the authorisation letter, loan application form vide Ext.2, sanction order vide Ext.3, Loan agreement vide Ext.4, agreement made by the guarantor vide Ext.5, D.P. Note vide Ext.6, Balance confirmation letter of defendant No.2 vide Ext.7, Balance confirmation letter of defendant No.1 vide Ext.8, Copy of Advocate notice vide Ext.9 and statement of account regarding loan outstanding dues as aforesaid vide Ext.10. In his cross examination P.W.1 has stated that the loan transaction was not made in his period and the defendant No.2 is the guarantor but he is not the loanee. The defendant No.2 has not applied for loan to the bank. He does not know the signature of defendant No.2. The agreement of defendant No.2 is not executed in his presence so also the D.P. note and debit balance confirmation letter. Further stated that except correspondence no action has been taken to recovery of loan amount from defendant No.1.

8. Admittedly, the Defendant No.1 has availed a loan of Rs. 1,00,000/- (Rupees one lakh) on dated 11.03.2002 by executing term loan agreement vide Ext.1 and a deed of guarantee vide Ext.5 by defendant No.2. It is pleaded that the defendant also agreed to repay the said loan in 120 monthly installments at the rate of Rs. 1406/- (Rupees one thousand four hundred six) per month. It is also pleaded that Defendant No.1 did not pay the installments regularly on the repeated demands of plaintiff bank for which this case has been filed

for realisation of Rs.1,42,721/- (Rupees one lakh forty two thousand seven hundred twenty one) . Since the evidence of P.W.1 has not been challenged by defendant No. 1 and he became set exparte, it can be safely said that the defendant No.1 is completely liable for making such payment of dues of the plaintiff.

9. Besides that as admitted by P.W.1 in his evidence that defendant No.2 is the guarantor for defendant No.1 and accordingly, the defendant No.2 executed agreement on 11.3.02 with plaintiff bank. The defendants signed in the promissory note. The defendants also agreed that both are jointly and severally liable for the purpose. Learned counsel for the defendant No.2 has submitted that P.W.1 in his cross-examination has also stated that defendant No.2 is not the lonee and the signature of defendant No.2 was not obtained in his presence and the agreement of defendant No.2 so also the demand promissory note also not executed in his presence. In this circumstances, the defendant No.2 cannot be liable for such payment made by the plaintiff. Learned counsel for the plaintiff bank submitted that since defendant No.2 is the guarantor he is jointly and severally liable for the default of payment of defendant No.1.

10. Let me examine the details of oral and documentary evidence laid by the parties relating to the fact in issue. According to Sec. 128 of contract Act which reveals as thus. Surety's liability- The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The said section has been clearly analyzed by the apex court in a decision reported in State Bank of India Vs. M/s. Registered and others. AIR-1992-SC-1740, which read as; -

“ Thus it is clear that contract of guarantee is an independent contract making the liability of surety co-extensive with that of principal debtor, unless otherwise agreed upon. The creditor can

opt to proceed to recover debt against the surety independently of the principal debtor. Even though, the contract of surety may originate from same transaction, it creates rights and liabilities which would be “separate and distinct” from the rights and liabilities created like contract between principal debtor and creditor. These two cannot be mixed up. It is therefore, clear that the subject of contract to the contrary, liability of surety remains intact so long as the debt of principal debtor is not discharged. This is what the word “co-extensive “ in section `128 of the contract act means, since the contract of guarantee is an independent contract the surety cannot require the creditor, to recover the debt from principal debtor personally or from the securities furnished by the principal debtor for repayment of loan by way of hypothecation, pledge, or mortgage. If this be, permitted then it would amount to trenching upon altogether different contract between the principal debtor and the creditor. This right is not vested in a surety ordinarily in a contract of guarantee. The use of word “ co-extensive “ some times may create confusion. The extent mentioned in sec.128 of the contract act must be limited to the liability of the principal debtor and not to the manner of discharge of debt of the principal debtor. Therefore, this court come to the conclusion that right to recovery a debt wholly or partly vest in a creditor till such time of debt of principal debtor is discharged. Then only the liability of surety comes to an end.

11. In view of the above authority it is crystal clear that the defendant No.2 is also jointly and severally liable for such payment. Accordingly, the issues are answered.

ISSUE NO. 1, 2 & 6

10. These issues are formal in nature, need no elaboration. In the discussion, supra, the Plaintiff has got cause of action to file the

present suit against the Defendant No. 1 and 2. So the suit is maintainable in the eye of law. There is no other evidence with regard to any other relief. So these issues are answered accordingly.

Hence, it is ordered.

ORDER

The suit be and the same is decreed on contest against the defendant No.2 and decreed on exparte against the defendant No.1 with cost. The plaintiff is entitled to get Rs.1,42,721/- (Rupees One lakh forty two thousand seven hundred twenty one) along with P.I. and F.I. @ 11.05% per annum. The Defendant No. 1 is directed to pay the above decreetal amount within three months hence, in case of failure the plaintiff bank is at liberty to realize the same from the defendants in due process of law.

Lawyer's fee at contested scale.

2nd Addl. Senior Civil Judge,
Bhubaneswar

Judgment is typed out to my dictation, corrected and pronounced in open court, on this the 1st day of September, 2014 under the signature and seal of this court.

2nd Addl. Senior Civil Judge,
Bhubaneswar.

LIST OF WITNESSES EXAMINED FOR THE PLAINTIFF:

P.W.1 : Surendra Nath Parida.

LIST OF WITNESSES EXAMINED FOR THE DEFENDANTS:

None

LIST OF DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF PLAINTIFF:

Ext.1 Authorisation letter

Ext.1/a : Signature of AGM on Ext.1

Ext.1/b Signature of P.W.1 on Ext.1

Ext.2 Loan application of D.1.

Ext.3 :Sanction order.

Ext.4: Loan agreement.

Ext.4/a : Signature of D.1 on Ext.4

Ext.4/b: Signature of Chief Manager of Ext.4

Ext.5 :Agreement.

Ext.5/a: Signature of D-2 on Ext- 5

Ext.6 :DP Note by D-1

Ext.7: Balance confirmation letter by D-2

Ext. 8 : Balance confirmation letter of D-1.

Ext. 9 : Copy of Advocate's notice

Ext.9/a & 9/b:Postal receipts.

Ext 10 : Statement of account

LIST OF DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF DEFENDANTS:

NIL

2nd Addl. Senior. Civil Judge
Bhubaneswar.

**IN THE COURT OF 2ND ADDL. SENIOR CIVIL JUDGE,
BHUBANESWAR**

M.S. NO. 73/1474 of 2013/2010

State Bank of India.

..... Plaintiff

-Versus-

Smt. Jasoda Kanhar & another.

....Defendants

I S S U E S

- 1) Is the suit maintainable in the eye of law?
- 2) Is there any cause of action to file the present suit ?
- 3) Whether the Plaintiff is entitled to get recovery for an amount of Rs.1,60,061/- (Rupees One lakh sixty thousand sixty one) with PI and FI @ 12.25% per annum?
- 4) Whether the Defendants No.1 and 2 are liable jointly and severally for that?
- 5) Whether the plaintiff is entitled for any other relief?

2nd Addl. Senior Civil Judge,
Bhubaneswar
Dt.10.01.2014