

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE -CUM- SPECIAL
JUDGE, CBI-II, BHUBANESWAR.

PRESENT:

Dr.A.K.Mishra,

Addl. District Judge -cum-
Special Judge, CBI-II, Bhubaneswar.

R.F.A. No. 14/20 of 2015/2011.

Arising out of Judgment and decree
dated 31.8.2010 passed by 2nd
Addl. Senior Civil Judge, Bhubaneswar
in Civil Suit No.31/405 of 2010/2008
(Money).

State Bank of India, Bhubaneswar Main Branch, Bhubaneswar
Represented through its Stressed Assets Resolution Centre,
Rasulgarh, Bhubaneswar by its Case Officer.

... Appellant.

Versus.

1. Gobinda Chandra Nayak, aged about 38 years,
Son of late Maheswar Nayak, At- Qr. No.G-27,
Unit-8, P.O.Nayapalli, Bhubaneswar.
Permanent Address: Vill./P.O. Baunsiapada,
P.S./Dist. Nayagarh
Working as Sweeper, G.A.Department,
Secretariat, Bhubaneswar.
2. Smt. Tuni Naik, aged about 52 years,
w/o. Bhagirathi Naik,
At. Qr.No.F-3/3, Unit-9, Bhubaneswar,
Permanent address:- Vill/P.O. Champatipur,
P.S./Dist. Nayagarh.
Working as Sweeper, G.A.Department,
Secretariat, Bhubaneswar.
3. Under Secretary to Govt. Of Orissa, G.A. Department,
Secretariat, Bhubaneswar.

... Respondents.

For the Appellant :

Sri B.K.Sahoo, Advocate.

For the Respondent No.1 &2: None.
For the Respondent No.3. Sri R.P.Nanda, Govt. Pleader.

Date of argument : 12.1.2016.
Date of Judgment : 14.1.2016.

JUDGMENT.

This appeal is preferred by the plaintiff- appellant against the judgment and decree dated 31.8.2010 and 16.9.2010 respectively passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.31/405 of 2010/2008 (Money) wherein and whereunder a contested money claim was decreed for a sum of Rs.1,10,855/- with P.I and F.I @ 10% per annum till realization without cost against the defendant no.1 and 2 and was dismissed against the defendant no.3. All the defendants are respondents.

Originally, the memorandum of appeal was presented before the Hon'ble High Court of Orissa on 16.11.2010 and vide order dated 15.2.2011 in RFA No. 286 of 2010 it was returned for presentation in the proper court and in compliance thereof, it was registered afresh on 7.5.2011 in the court of the District Judge, Khurda at Bhubaneswar. On transfer, it is brought to the file of this court. Respondent No.1 and 2 have failed to take part in hearing and are thus, set ex-parte vide order dated 12.1.2016.

2. The brief facts may be set out to get a hang of the issues agitated in this court. The plaintiff bank filed suit on 12.5.2008 averring that defendant no.1 had availed a loan of Rs.90,000/- executing loan agreement on 16.8.2005 stipulating the interest @ 8% per annum with quarterly rest. The defendant No.2 executed a deed of guarantee on the same day for the said loan. Defendant No.3, the Drawing and Disbursing Authority of the loanee- defendant no.1 had

executed an irrevocable letter of authority on 14.7.2005 to deduct monthly installment of Rs.1092/- from the salary of the defendant no.1 to liquidate the debt. The defendant No.1 was a permanent employee of General Administration Department of Govt. Of Orissa. When default was made in making payment, on 10.7.2008 legal notice u/s. 80 CPC was issued to the higher authority of defendant no.3 and for no response, the suit was filed for realization of outstanding as per statement of account to the tune of Rs.1,10,855/- with interest and also for cost.

Defendant No.1 and 2 together filed written statement admitting the plaintiff's claim and execution of documents, but advanced the plea of poverty being a low salaried employee for higher rate of interest towards repayment. Defendant No.3 had not filed written statement.

3. Learned lower court framed four issues including issue no.3 relating to the liability of all the defendants. The case officer of the plaintiff-bank was the lone witness examined on behalf of the plaintiff who proved all the executed documents vide Ext.1 to Ext.10. Neither oral nor documentary evidence was adduced on behalf of the defendants.

4. Learned lower court analyzing the documents and admission of defendants no.1 and 2 decreed the suit against defendant no.1 and 2. Learned lower court found that as neither plaintiff bank nor defendant no.1 had intimated the defendant no.3 about non-deduction of installments as per Ext.5, the defendant no.3 could not be saddled with loan liability. Though in the ordering portion the suit was decreed without cost, no reason is found to have been assigned.

5. Learned counsel for appellant put forth his submission that defendant no.3 having executed a irrevocable letter of authority, Ext.6, for deduction of installments from the salary of the defendant no.1 which remained uncontroverted, the dismissal of suit against defendant no.3 is unsustainable in the eyes of law. Further the cost of the suit should have been decreed as per section 35 (2) C.P.C when bank incurred expenditure towards court fees and advocate fees. In support of this later contention, reliance is placed in the decision reported in **State Bank of India -vrs- Nilakanta Ray and others 71 (1991) CLT Page-493.**

6. Per contra, Learned Govt. Pleader Mr. Nanda appearing for respondent no.3 repelled the above contention stating that when the Under Secretary to Govt. G.A. Department, Secretariat Bhubaneswar is impleaded by designation and there is no evidence that he was within his jurisdiction to execute irrevocable letter of authority Ext.6, no liability can be fixed for the loan transaction between the plaintiff bank and the loanee-defendant no.1. His further contention is that in a suit against a public officer in official capacity, if state is not impleaded as a party, the officer cannot be fastened with liability as per decision reported in **(2012) 2 SCR Page-887 Coal Mines P.F.Commissioner, the Board of Trustee -vrs- Ramesh Ch. Jha.**

7. Thus the appeal is turned out to be confined in its scope to the following points :

- (i) Whether in this nature of suit decreeing the loan outstanding as per agreement, the cost should have been awarded u/s.35 of the Code of Civil Procedure.
- (ii) Whether dismissal of suit against defendant no.3 is legally sustainable?

8. ANSWER TO POINT NO.1

This is a money suit where plaintiff bank has advanced personal loan to defendant no.1, an employee under Govt. of Orissa. The defendant no.1 admits the same. For the default in the payment, the plaintiff bank was forced to file the suit and learned lower court found liability of defendant no.1 and 2, loanee and guarantor, coextensive. The interest both pendente-lite and future has been decreed. No reason has been assigned in the impugned judgment for not awarding the cost which is in contravention of Sec.35 (2) C.P.C. In the above cited **Nilakantha Ray** decision, it is reiterated that

“So far as the cost is concerned, however, section 35 of Code of Civil Procedure, governs the same. As has been said in the aforesaid bench decision the award of cost is clearly within the jurisdiction of the court and if the trial court exercises that discretion, the appellate court would be loath to interfere with the same. But if that discretion has been exercised on a misappreciation of fact and law or the court below has not exercised any real discretion in making the direction or the discretion can be said to be not judicial, that is, not based on sound and well established legal principle, then the appellate court may interfere with the direction of the trial court with regard to grant of cost”.

9. As respondent no.1 and 2 did not choose to contest the appeal and no plea is advanced for unawarded cost of the suit particularly when court fees and other expenses are incurred by the plaintiff- bank for this lis, the cost should necessarily follow the decree and learned lower court having exercised her discretion in

contravention of Sec. 35(2) CPC, the impugned order to the extent of "decree without cost" is to be reversed and same is done here.

10. ANSWER TO POINT NO.2.

Defendant No.3 is impleaded by designation of the Under Secretary to Govt. of Odisha, G.A. Department, Secretariat Bhubaneswar. It is common knowledge that more than one Under Secretary work in the G.A. Department. The Drawing and Disbursing Authority is an additional empowerment under notification. There is no material available that the officer who had executed Ext.6 irrevocable letter of authority was duly authorized by the appointing authority of the defendant no;.1 to give such an undertaking to the bank. Besides that in the **Coal Mines P.F.Commissioner, the Board of Trustee -vrs- Ramesh Ch. Jha.** decision, with regard to non-joinder of state under order XXVII rule 5-A C.P.C it is held that

"14. We, therefore, have no hesitation in holding that in view of the fact that the Coal Mines Provident Fund Commissioner has been held by this Court to be a public officer, it was necessary to join the Union of India as a party in the suit in view of the provisions of Order XXVII Rule 5A of the Code of Civil Procedure."

11. Upholding the contention of learned G.P, for the non-joinder of State of Odisha in contravention of order XXVII rule 5(A) CPC in respect of defendant no.3, the dismissal of suit against him in the impugned judgment cannot be said illegal and for that no interference with the impugned judgment on that score is permissible.

12. In sequence to the aforesaid answer to the points posed in this appeal, the impugned judgment warrants interference to award cost in favour of the plaintiff-appellant. Hence, it is ordered.

ORDER.

The appeal be and the same is allowed ex-parte against Respondent No.1 and 2 and the impugned judgment and decree dated 31.8.2010 and 16.9.2010 respectively passed by the learned lower court in Civil Suit No. 31/405 of 2010/2008 (Money) to the extent of not awarding cost is reversed. In addition to the decretal dues with interest, the cost of the suit is decreed in favour of the plaintiff. The dismissal of the suit against defendant-respondent no.3 is confirmed on contest. The cost of the appeal is also decreed in favour of the plaintiff-appellant against the respondent no.1 and 2.

Addl. District Judge-cum- Special Judge,
C.B.I.-II, Bhubaneswar.

Typed to my dictation and corrected by me. Judgment is pronounced in the open court today, this the 14th day of January, 2016.

Addl. District Judge-cum- Special Judge,
C.B.I.-II, Bhubaneswar.