IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.417 of 2010

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Hari Narayan Sinha, S/O Late Madan Singh, R/O 447, Nehru Nagar, P.S. Patliputra, Patna, Distt-Patna Presently Residing At 22, Himgiri Bunglow, Piplod, P.S. Umra, Surat

... ... Petitioner-Appellant/s

Versus

1. The State of Bihar through Principal Secretary-cum- Industrial Development Commissioner, Department of Industries, Govt. of Bihar, Patna.
2. The Bihar State Financial Corporation, Fraser Road, Patna through its Managing Director.
3. The Managing Director, Bihar State Financial Corporation -Cum-Specified Authority U/S Section 32G of SFCs Act, Fraser Road, Patna
4. Sri S. S. Sharraf, S/O Not Known to the petitioner-appellant, Authorized Officer under Section 32G of The SFCS Act, Bihar State Financial Corporation ,Fraser Road, Patna.
5. Sri S.K . Srivastava, Dy. Manager (L), S/O Not Known to the petitioner-appellant, Dy. Manager (Legal), Bihar State Financial Corporation ,Fraser Road, Patna.
6. Branch Manager, Patna Branch Bihar State Financial Corporation, Indira Bhawan, Ramcharitra Path, Patna
7. Bihar State Credit And Investment Corporation Indira Bhawan, Ram Charitra Path, Patna through its Managing Director.
8. M/S Patna Rolling Mills Ltd. B/31, Khetan Super Market, Birla Mandir Road, Patna through its Director

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Manik Vedsen, Advocate
Mr. Subhash Chandra Bose, Advocate

For the Respondent/s : Mr. Nikhil Kumar Agrawal, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 15-12-2020

Whether the action of the Creditor for recovering

the dues against the guarantor under Section 32G of the State Financial Corporation, 1951 (hereinafter referred to as the SFC Act) is within the period of limitation or not? is the issue which arises for consideration in the present appeal.

2. Creditors' action in initiating such proceedings stands affirmed by the learned Single Judge. His opinion rendered in terms of the impugned judgment dated 2nd December, 2009 in CWJC No.10565 of 2008 titled **as Hari Narayan Sinha Versus The State of Bihar & Ors.** is a subject matter of consideration in the present appeal, preferred under Clause 10 of the Letter Patent Constituting the High Court of Judicature at Patna.

3. We need not go into the extent or scope of power in the exercise of jurisdiction under the Letter Patent Constituting the High Court of Judicature at Patna, for it not to be an issue in question.

4. We also need not go into the scope of an inquiry or the applicability of the provisions of Section 32G of the State Financial Corporation, 1951, for petitioner/appellant does not lay any challenge to the same, perhaps rightly so, given the discussions and the view taken by the learned Single Judge, based on the decision rendered by Hon'ble the Apex Court in

Delhi Financial Corporation V. Rajiv Anand, (2004) 11 SCC 625.

5. Here only we may add that the said view of the Apex Court, dealing with intent, purport and scope of the said Section stands reaffirmed and reiterated in **Karnataka State Financial Corpn. v. N. Narasimahaiah, (2008) 5 SCC 176,** and **Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230.**

6. The limited point urged before us, is such action of the Creditor in initiating the proceedings, to be barred by law of limitation.

7. In support of his contention, Shri Manik Vedsen, learned counsel for the appellant, seeks reliance upon the decisions of the Hon'ble Apex Court in **New Delhi Municipal Committee Versus Kalu Ram and another, (1976) 3 SCC 407 (two-Judge Bench)**; **State of Kerala and others Versus V.R. Kalliyanikutty and another, (1999) 3 SCC 657(three-Judge Bench)**; and **Syndicate Bank Versus Channaveerappa Beleri and others, (2006) 11 SCC 506 (two-Judge Bench).**

8. Opposing the appeal, Shri Nikhil Kumar Agrawal, learned counsel for the respondents seeks reliance upon a decision of the Hon'ble Apex Court in **Deepak Bhandari**

Versus Himachal Pradesh State Industrial Development Corporation Limited, (2015) 5 SCC 518 (two-Judge Bench), and the Punjab and Haryana High Court in **Jagdish Rai v. Haryana Financial Corporation, AIR 2008 Punjab and Haryana 50.**

9. The facts, which are not in dispute are as under:

10. Petitioner Hari Narayan Sinha, promoted a Company, duly registered under the Companies Act, by the name Patna Rolling Mills (P) Limited (referred to as the Company), of which he was the Director. For creating infrastructure, certain credit facilities by way of a loan were availed by the Company from certain financial institutions, including, Bihar State Financial Corporation and Bihar State Credit and Investment Corporation, (in brief referred to as BSFC and BICICO respectively). It was a consortium of BSFC and BICICO which extended the credit facilities, about which the properties and the assets of the Company stood mortgaged. The charges of the institutions ran *pari-passu* over the mortgaged property of the Company. The petitioner stood guarantor against such loans taken by the Company. On 7th January, 1987, the Financial Institution recalled the loan amount and in default thereof, initiated proceedings as per law. On 28th

June, 1996, the BICICO, the co-financer (consortium partner) took over possession of the assets of the Company and sold it on 5th March, 2002, with the possession handed over to the successful bidder on 16th March, 2002.

11. Challenging such sale, the Company of which the present petitioner was a promoter and a Director, initiated several proceedings which attained finality only with the decision dated 5th December, 2005 rendered by the Hon'ble Supreme Court of India. The action for sale of the assets stood affirmed.

12. In the interregnum, on 27th September 2002, BSFC noticed the petitioner and initiated proceedings against him in his capacity as a guarantor under Section 32G of the SFC Act, which action impugned by the petitioner, stands upheld by the learned Single Judge vide impugned judgment dated 2nd December 2009 passed in CWJC No.10565 of 2008 titled as **Hari Narayan Sinha Versus The State of Bihar & Ors**.

13. Before us, it is not in dispute, which fact we also find emanating from the written submissions filed by the Creditor, that the nature of the surety of the guarantor is continuance. It is also not in dispute that the assets of the Company, subject matter of adjudication by several Courts,

including the Supreme Court of India, were sold off under the action initiated by the co-creditor (BICICO- consortium partner) having *pari passu* charge. It is also in dispute that prior to finalization of the said litigation, the petitioner was noticed by BSFC as a guarantor on 27th September, 2002 and action initiated under Section 32G of the SFC Act.

14. The power exercised under Section 32G is without prejudice to any one of the mode of recovery to which the Creditor is otherwise entitled to under law.

15. Noticeably, action initiated against the petitioner is not under Section 29 of the SFC Act or any other law, but straightway under Section 32G of the SFC Act.

16. Before us, it is also not disputed that the amount, post adjustment of the sale of the assets by the consortium partner is still due and payable to the Financial Corporation and that it is in respect of accommodation of loan granted to the Company, about which the petitioner stood surety as a guarantor.

17. The agreement *inter s*e the parties is governed under the provisions of the Indian Contract Act, 1872 (referred to as the Contract Act), Chapter VIII whereof- Section 124 to 181, deals with indemnity and guarantee.

18. Section 126 defines what is a "Contract of guarantee"; "surety", "principal debtor" and "creditor". Section 128 specifically provides the liability of the surety to be co-extensive with that of the principal debtor, unless otherwise provided by the contract and Section 129 takes care of continuing guarantee, to be the one which extends to a series of transactions. The surety by section 130 has a right to revoke the continuing guarantee. But then it has to be through a notice to a guarantor and concerning future transactions. The only other way by which the continuing guarantee can be revoked is surety's death as stipulated under Section 131. Section 132 takes care of a situation where the liability of two persons, primarily liable, is not affected by an arrangement amongst them, of one to be a surety on the other's default. Section 133 takes care of a situation where the parties vary the contract without the surety's consent, making the action after such variance, not binding on the surety. The surety, under Section 134, can be discharged by the principal debtor. Section 137 of the Act takes care of a situation where the creditor forbears to sue even then the surety can be said to be discharged. And the only other way of discharge of the surety is its performance.

19. The petitioner never contended, nor has he

stated so, that on facts or law, the surety stood discharged, more so, resulting from actions of the Creditor/ principal debtor, or the provisions of Chapter VIII of the Contract Act.

20. Noticeably, the Creditor's action stands challenged by the surety only on the ground it being beyond the period of limitation prescribed under the Limitation Act.

21. Cumulatively viewed, we do not see as to how, in the attending facts, the provisions of default under the Limitation Act would be applicable at all. Defaults of repayments, persistent in nature, continued even with the sale of the assets of the Company. The contract never stood modified abrogated or rescinded between the Creditor and the principal debtor or for that matter the guarantor/surety; it never stood discharged or altered; the payment is still due and payable towards the principal loan so advanced by the Creditor. It always was, on the date the initiation of action which was within three years from the date of adjustment of sale proceeds of the assets of the principal debtor.

22. We find the issue in hand to be squarely dealt with by Hon'ble the Apex Court in **Mrs. Margaret Lalita Samuel Versus The Indo Commercial Bank Ltd. (1979) 2 SCC 396**, (three-judge Bench). The Court categorically held

that in a case of a continuing guarantee, the period of limitation would start to run from the date the cause of action would arise with the breaking of the contract for continuing guarantor which would be the date of refusal on the part of the party to carry out the obligation under the agreement.

23. With profit, we reproduce the observations made by the Bench on the law of continuing guarantee.

> **"10.** …… The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach under Article 115 of the schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J.C. Shah, J., speaking for the Court said:
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> "On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever .... We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond .... We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained live account, and there was no refusal on the

part of defendant to carry out her obligation, the period of limitation did not commence to run."

11. We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Preview Council in *Wright* v. *New Zealand Farmers Cooperative Association of Canterbury Ltd.* [(1939) AC 439 : (1939) 2 All ER 701 (PC)] The second clause of the gurantee bond in that case was in the following terms:

"This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid."

A contention was raised in that case that the liability of the guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of advance. The Judicial Committee of the Privy Council expressed the opinion that the matter had to be determined by the true construction of the guarantee. Proceeding to do so, the Judicial Committee observed (at p. 449):

"It is no doubt a guarantee that the Association will be repaid by the Nosworthys advances made and to be made to them by the Association together with interest and charges; but it specifies in column 2 how that guarantee will operate — namely, that it will apply to (i.e. the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as Their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard

> to the time which had elapsed since the balance guaranteed and sued for had been constituted."
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> Later it was again observed (at p. 450):
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> "That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counter-claim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys, with interest, was not statute-barred."
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> (Emphasis supplied)

24. Subsequently, in **Syndicate Bank Versus Channaveerappa Beleri and others, (2006) 11 SCC 506,** the Court observed that:

> **"13.** What then is the meaning of the said words used in the guarantee bonds in question? The guarantee bond states that the guarantors agree to pay and satisfy the Bank "on demand". It specifically provides that the liability to pay interest would arise upon the guarantor only from the date of demand by the Bank for payment. It also provides that the guarantee shall be a continuing guarantee for payment of the ultimate balance to become due to the Bank by the borrower. The terms of guarantee, thus, make it clear that the liability to pay would arise on the guarantors only when a demand is made. Article 55 provides that the time will begin to run when the contract is "broken". Even if Article 113 is to be applied, the time begins to run only when the right to sue accrues. In this case, the contract was broken and the right to sue accrued only when a demand for payment was made by the Bank and it was refused by the guarantors. When a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made,

> the breach occurs or right to sue accrues, when the demand is served on the guarantor."
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> (Emphasis supplied)

25. Still closer to the issue is the recent decision rendered by Hon'ble the Apex Court in **Deepak Bhandari (two-judge Bench) (supra),** wherein the Court observed that initiation of action by the Corporation, under the provision of Section 29 of the SFC Act., would not render the liability of the surety to be nugatory or the period for limitation to have commenced, for action of taking possession,under the said provision was only in the aid of realizing the amounts for adjustment against the amount due. The contract of mortgage may have come to an end, but not that of indemnity and the right to claim balance under the agreement of indemnity would arise when sale proceeds are found to be insufficient, and the Court observed that:-

> "The right to sue on the contract of indemnity arose after the assets were sold. The present case would fall under Article 55 of the Limitation Act, 1963 which corresponds to old Articles 115 and 116 of the old Limitation Act, 1908. The right to sue on a contract of indemnity/guarantee would arise when the contract is broken.
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> 29. Therefore, the period of limitation is to be counted from the date when the assets of the Company were sold and not when the recall notice was given."

26. Reliance on a decision of the Hon'ble Apex

Court in **Kalu Ram (supra) (two-judge Bench)** is totally misconceived. The Court neither considered, nor was it required to do so, with the provisions of Contract Act or the SFC Act. It was not a case of continuing guarantee. In any case, subsequent judgments, as a matter of judicial discipline and binding precedents would bind us.

27. The Hon'ble Apex Court in **V.R. Kalliyanikutty (supra), (three-judge Bench)** was dealing with a different set of facts and proposition of law. The Creditor had initiated action under the Kerala Revenue Recovery Act, 1968. While examining as to whether an action for recovery of the amount under Section 71 of the said Act was barred by law of limitation or not, the Court only held the Act not to create a new right for recovery to prevail upon the law of limitation. The expression amount due, so discussed in the judgment was in the context of the agreement and consequently, the law governing the parties, unlike the Contract Act binding the parties in the instant case.

28. In **Ashok K. Agarwal (supra) (two-Judge Bench),** the Hon'ble Apex Court was dealing with the case where the Financial Corporation had sanctioned loan to the Company concerning which the respondents stood as surety.

The Creditor called for the repayment of the loan, and upon failure to repay the same, the process for the sale of hypothecated goods was initiated. The sale took place on 11th June 1990, and for the shortfall of payment of the outstanding amount, the Corporation sent notices to the surety to meet the due obligations, and non-fulfillment thereof, action under Section 31(1)(aa) was initiated on 2nd January 1992. Prior thereto, the action against the principal debtor stood instituted under Section 31 and 32 of the Act on 25th October 1983. It is in this backdrop the Court observed that for initiation of action under Section 31, the provisions of Section 136 and 137 of the Limitation Act would not apply. The Court thus observed the claim of the surety to be barred by the law of limitation, for in the attending facts, the share of surety stood crystallized much before the prescribed period of limitation. It is observed that one of the members of the Hon'ble Bench was Arun Kumar, J., who was a party to the subsequent decision in **Syndicate Bank (supra).**

29. Learned counsel for the parties raises no other submission.

30. Hence it is a case of a continuing guarantee, the period of limitation would commence from the date of

confirmation of sale and adjustment of amount thereof. Noticeably, the litigation initiated by the Company, through the petitioner, culminated only on 5th December 2005 before which date, on 27th September 2002 petitioner was noticed and proceedings initiated against the petitioner.

31. Hence, for all the reasons mentioned above, we do not find any reason to interfere with the view taken by the learned Single. Accordingly, the appeal stands dismissed.

32. Interlocutory application, if any, shall stand dismissed.

(Sanjay Karol, CJ)

S. Kumar, J I agree.

(S. Kumar, J)

K.C.Jha/-

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